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1305

No. 3786

1306

IN THE

1306

United States Circuit Court of Appeals

For the Ninth Circuit

Northern District of California

JOHN E. GILCHRIST,

Appellant,

VS.

F. B. MALLORY COMPANY,

Appellee.

On Patent 977,613

Dated December 6, 1910,

for Logging Block

BRIEF FOR APPELLANT.

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Of Counsel.

FILED

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F. D. MONCKTON,
CLERK

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BRIEF FOR APPELLANT.

This suit originally involved two patents issued to the plaintiff-appellant for self-oiling pulley blocks used in that peculiar branch of logging known as the "High Line Lead" or "Sky-Line" System.

Gilchrist is a manufacturer of logging apparatus located at South Bend, Washington, and doing business under the name of Willapa Harbor Iron Works. He has three patents issued to him relating to pulley blocks; one in 1904 (not in issue); one in 1910; and one in 1913.

The suit was originally brought on the 1910 and 1913 patents. The 1910 patent No. 977,613, issued December 6th, 1910, was held void for anticipation and for want of invention. The 1913 patent was held not infringed.

On this appeal we shall urge error only in respect to the 1910 patent, since we are convinced, after a careful study of the record, that the finding with respect to the 1913 Improvement Patent is substantially correct.

Assignment of Errors Relied On (R. 31).

It is urged on this appeal:

(1) That the trial Court erred in holding that Claims 1, 4 and 5 of the Gilchrist patent No. 977,613, issued December 6th, 1910, are respectively made up of elements old in the art which perform no new function, disclose no new mode of operation and produce no new result.

(2) That the trial Court erred in holding that these claims are invalid for lack of patentable novelty.

(3) That the trial Court erred in holding that the novelty of these claims resides in any individual element rather than in a combination.

(4) That the trial Court erred in holding that these claims involve merely an aggregation of old devices and that each of said claims fails to disclose a combination.

(5) That the trial Court erred in holding that these claims are invalid for want of invention.

(6) That the trial Court erred in holding that the several elements of the claims in controversy functioning in cooperation as a logging block of superior utility, do not, as to each claim, produce any new result.

Statement of Facts.

As the records show, the method of logging in the Northwest up to about the year 1898 was with ox-teams and horses, the movement of the logs under such a system being necessarily slow, and when a pulley or tackle block was used to assist in moving the extra heavy logs, it was a simple block, usually home-made by the camp blacksmith, consisting of two sides of boiler plate, a bearing pin between and a sheave rotating on the pin. Such blocks were oiled with a common squirt oil can.

A few years later, in 1900 or thereabouts, steam logging was introduced, the steam donkey engine coming into general use, and at first the same boiler plate block was used, which had to be oiled with a squirt can every time you "took a pull". About 1902-3 the compound block made its appearance, the grease or compound, or "hard oil", as it was called, being fed by pressure through an axial opening in the bearing pin and out through radial holes to the surface of the pin, thus feeding the lubricant to the bearing surfaces of the pin and rotating

sheave. The pin was made hollow to hold a small supply of grease and a plug screwed into the outer end of this chamber forced the grease as described to the bearing. Also the "grease cup" block was used a little later and an elbow extension of the pin which fed grease or oil to the bearing. This type of block with a supply of grease which was forced to the bearing by pressure, or the outside elbow and grease cups, were never satisfactory nor held up to the work, being a constant source of expense and delay; the grease cups and elbows got broken off and blocks so equipped demanded hourly attention to screw up the plugs or caps to force the grease to the bearings, or to renew the oft broken elbows and grease cups. The slightest neglect resulted in the sheave bushings burning out and scoring the bearing pins, with a consequent tying up of the logging operations, until a new block was substituted or the old block repaired, a costly experience, but a common one.

Many attempts were being made from 1900 on to provide a satisfactory block, but none were forthcoming until the patented self-oiling block of Gilchrist in 1910. Mr. Tyler, a practical logger, testifies that he worried along with the grease cup type of block for seven or eight years, until he got hold of a Gilchrist self-oiling block in 1910, which proved to be a "perfect success". This was the common experience in the logging industry from 1900 to 1910. Mr. Owen, another logger, states that the Gilchrist type of block is a particularly good block

because of the combination of the long bearing pin and hub, the oiling device and the hinged top. Gilchrist had taken the final step which solved the logging pulley block problem. Admittedly, every feature of Gilchrist existed here and there separately in the prior art, but it was left to Gilchrist to take the step that won him practical recognition as solving a long existing want.

Plaintiff's catalogues indicate (Exh. 40, 1914 catalogue, and Defts. Exh. 3-W, 1917 catalogue) that Mr. Gilchrist was a manufacturer of logging tools as early as 1900. It is unfortunate that the health of complainant made it impossible for him to take the stand and testify as to his activities in this important northwest industry (R. 207). Ever since Mr. Gilchrist started business at South Bend, Washington, he has been manufacturing pulley blocks and experimenting to improve them (R. 208), having taken out fourteen patents in all covering logging equipment, six of which relate to pulley blocks.

The invention in issue was developed and reduced to practice as early as October, 1909 (R. 206). Quite promptly thereafter application for the patent in suit was filed on March 23rd, 1910. From that time forward the business of Mr. Gilchrist has been the manufacturing and selling of his patented pulley blocks and this business has steadily increased until it now constitutes a large part of his output.

The defendant-appellee, F. B. Mallory Company, was incorporated in 1912 (R. 72).

Mr. Mallory had previously testified (R. 78) :

“I first heard of the Gilchrist blocks in about 1910 and 1911; I sold a few of complainant’s blocks at that time subsequent to the issuance of the patent in suit; I don’t know whether they were marked patented at that time or not. I ordered such blocks from the Willapa Harbor Iron Works (the complainant’s trade name) and sold them to the trade. I first began the manufacture of my self-oiling block in March, 1914; the Clarke County Iron Works made the patterns for me in February, 1914.”

On page 80 of the Record appears a copy of a telegram (Plaintiff’s Exhibit 11) dated *October 31st, 1913*, from Mallory to the Willapa Harbor Iron Works, reading as follows:

“Express twelve inch trip block oil reservoir cross head and hook. Ship today by freight two only twenty-four inch Hercules logging jacks number two. One only number three.”

It was immediately following the dispatch of this telegram or about that time, that Mr. Mallory says he began *making sketches* for the design of his block which is claimed to infringe. He says (R. 79) concerning the drawings and patterns:

“They were made from ideas that were given to the pattern makers. * * *

“From sketches that I submitted to the pattern maker or salesman.

“Q. Where did you get these suggestions from?

“A. From my *imagination*, I suppose, ideas that came.” (*Italics ours.*)

It is significant that Mr. Mallory at the same time that he was drawing on his “*imagination*” he also,

by his telegram of October 31st, *supra*, drew on the plaintiff for a patented self-oiling block.

Also we must not forget that when Mr. Mallory was drawing upon his "imagination", *he had before him in his catalogue of 1911 cross section cuts of the Gilchrist block*, which gave all the information which might be necessary for any one to have who desired to make models or patterns of the Gilchrist block. So we find that at the time of making such sketches, based upon his "imagination", Mr. Mallory not only had a self-oiling block of the complainant in his possession, but he also had cross-section cuts of said block in his own catalogue.

If the Mallory self-oiling block was developed from said sketches of Mr. Mallory, it is curious that the Mallory self-oiling block should so closely duplicate the Gilchrist self-oiling block.

ORAL RECOLLECTIONS CANNOT PREVAIL AGAINST REASONABLE INFERENCES FROM CONDUCT.

Woods v. Cleveland Co., 4 Fish, Pat. Cas. 550;
Atlantic Works v. Brady, 107 U. S. 192.

The natural tendency of the human mind to attach self credit and deprecate like qualities in others is interestingly illustrated in Mr. Mallory's case. Thus at R. 85 he testifies:

"I made the application for design patent upon these blocks because a design patent is

very inexpensive and it was the design we wanted to protect more than anything else; I did not think that there was any mechanical function to be patented nor anything new about these blocks; we are still operating under design patents.”

And, again (R. 231):

“The blocks shown in our advertisements have a distinctive design of their own, in shape, form, style of sides and pin arrangement; I was the first man to get out blocks of this distinctive design; the first sky-line and high-lead blocks of this design with auto-lubricating sides were put out by the defendant in March, 1914.”

However, we have already seen how in April, 1911, when Mr. Mallory was seeking an exclusive territory under the Gilchrist patented block that he recognizes it as something entirely new.

“It is quite common for those who are appropriating the results of another’s labor or inventive genius to attempt to belittle the device so appropriated, and insist that it required no exercise of the inventive faculty to produce it.”

Blodgett, J., in *Manufacturing Co. v. Rathbone*, 26 Fed. 262.

“There are always those who are ready to gather where they have not sown. The number and ardour of the conflict is usually in proportion to the value of the prize at stake.”

Mr. Justice Swayne in *Rubber Co. v. Goodyear*, 9 Wall. 793.

A distinguished English patent judge has said:

“Better evidence of the utility of an invention can not possibly be had than the fact that the defendant has attempted to infringe it.”

Kay, J., in *Lucas v. Miller*, 2 R. P. C. 155, 160.

As Judge Buffington has said:

“It is improbable that men will render themselves liable to actions for infringement unless infringement be useful.”

Goss Printing Press Co. v. Scott, 108 Fed. 253, 258, 47 C. C. A. 302 (C. C. A. 3rd).

“When the patentee has produced a structure which inaugurates a new industry and at once becomes popular, and therefore of great value, the Court should be zealous so to construe the claims as to give validity to what it believes to be a meritorious invention. * * * The infringing structure in this action is the result of another effort of the defendant to secure all the benefits of the McCann structure without the consent of its owner, by making a few formal inconsequential changes in no way altering the paramount and essential features of the invention.”

Coxe, J., in *Auto Vacuum Freezer Co. v. Sexton Co.*, 239 Fed. 898, 900, 901.

It should be observed in passing, however, that Mr. Mallory's statement that his block was gotten up from drawings or sketches or designs furnished by him is not in accord with the testimony of Mr. Hirschbeuhl (R. 95), a witness on behalf of de-

fendant and the machinist who did the work for Mallory. He testifies (R. 95):

“Q. Will you kindly explain to the court just how that oil reservoir block was developed and from what information you started and how you completed it?

“A. Well, Mr. Mallory, he was anxious to get a block with an oil reservoir side, so he used to come over. Of course, he was a large customer of ours and he always had lots of work done at the shops, so Sunday morning was a convenient time for him to come over and talk matters over, so we were talking over this block one time and he asked me if there couldn't be a way devised without much expense and without too radical a change to make an oil block—an oil side—a block side with an oil reservoir. So it happened that we were walking through the shop and we just noticed this block side here.”

The block side that he refers to is said to be the old type Mallory block.

As far as the evidence goes, and considering the long lapse of time, it is not a too violent assumption that they were talking about the Gilchrist block and had the Gilchrist block as well as the Mallory catalogue of the Gilchrist drawings before them. At least that would be the ordinary and usual way of setting about to build something. Whatever the sources of information and knowledge available to Mr. Mallory, he has nevertheless been an active and aggressive competitor for several years.

Immediately on the infringement of defendant being brought to the attention of Mr. Gilchrist, he

gave notice, and then followed a correspondence between the parties extending from November, 1914, until April or May of the following year; this correspondence being set out in the record at pages 64-70, inclusive. This correspondence shows with what deliberation the defendant entered upon the infringement. It also shows that the piracy is sought to be excused on the ground that certain "paper patents", which had been deliberately dug up for the purpose, constituted, in the mind of Mallory's patent solicitors, an anticipation. In other words, Mallory's attitude is not that of one who has set about to design a structure outside the claims of Gilchrist and which, of course, he had a right to do, but he has attempted (and fairly well succeeded) simply to grab the article "lock, stock and barrel" and appropriate it for his own use and set up the plea of "lack of title".

That Gilchrist never acquiesced in the attitude of defendant towards the patent in suit is evident from the record, besides there being absolute lack of any proof of such acquiescence. Not only did Gilchrist continue putting out his blocks bearing the patent date of December 26th, 1910, as required by statute, but notices of plaintiff's patent rights were published from time to time, and which notices were directed to Mallory as well as the rest of the trade, and which notices Mallory admits that he saw.

Instances of such publicity of Gilchrist's rights appear in the "Timberman", a technical journal of the logging industry, of general circulation in the

Northwest, which advertisement ran from February, 1916, to August, 1916, and practically from August, 1916, to date. A typical notice read:

NOTICE

“TO USERS OF SELF-OILING BLOCKS:

“I am the original inventor and patentee of SELF-OILING BLOCKS under patents issued December 26, 1910, June 3, 1913.

“I hereby give notice that I will hold legally responsible in damages all infringements of my patents covering the principle of a hollow chamber carrying a lubricant to lubricate the sheave pin.”

Then followed a cut of the block with the patent date on it and Gilchrist's name appearing, and under it the following:

“‘GILCHRIST’

“THE ORIGINAL SELF-OILING BLOCK

“UNIVERSALLY USED

“WILLAPA HARBOR IRON WORKS

“JOHN M. GILCHRIST, PATENTEE.”

These public assertions of right on Gilchrist's part, coupled with the intervening War-period between the May, 1915, correspondence between Gilchrist and Mallory and the filing of this suit in May, 1919, afford ample evidence against any claim by Mallory of laches or estoppel. To quote from the recent case of Victor Talking Machine Co. v. Cheney Talking Machine Co., 275 Fed. 444, 447 (decided August 5th, 1920):

“The proofs show and courts will take judicial notice of the extraordinary and abnormal conditions which existed in this country and in the world at large from the spring of 1917 to the spring of 1919, and, in a lesser degree, to the present time. Litigation of this character

was frowned upon by public officials, was discouraged by the courts, and, as far as possible, was avoided by every one. Under these circumstances, it cannot be said that plaintiff has been guilty of such laches as to preclude it from asserting its rights and prosecuting suits for trespasses thereon."

While the lower Court disregarded the affirmative defense of laches and equitable estoppel, it is not unlikely that the defense may be urged anew in this Court and for that reason we shall make brief reference to it.

As to laches. The defendant began to manufacture the self-oiling block, which is the infringement complained of, in April, 1914. This suit was instituted within six years thereafter.

Equity, by analogy, follows the statutes of limitations, and mere lapse of time which does not exceed the statutory limitations is never held as laches on the part of the complainant in a suit in equity except as aided by other circumstances. In law the complainant could have commenced his suit upon his cause of action at any time within six years, and likewise in equity, the complainant had a right to commence his suit within six years from the date of the infringement, and so long as he was within such six-year period, the defense of laches cannot be sustained.

As to equitable estoppel. It appears that the defendant is really raising a defense, not of laches, but of equitable estoppel. He says, in effect, that he

has been misled by the act or word of the complainant; that by such acts or words of the complainant he has been lulled into a sense of security so that he has placed himself in a disadvantageous position, which it would be inequitable for the complainant to take advantage of.

In the discussion of this matter, it should be remembered that this defense of equitable estoppel is an affirmative one and must be pleaded and proved by the defendant. The defendant must show what act or what word of the complainant misled him to his injury; and the defendant must further show that, relying upon such act or word of the complainant, he was, in fact, misled to his injury. (Columbia Co. v. Searchlight Co., 236 Fed. 135, C. C. A. 9th Cir.) We would ask the defendant to search the record and point out any testimony showing that he was, in fact, misled to his injury by any act or word of the complainant.

See also *Rajah Co. v. Belvidere Co.*, 275 F. 761, C. C. A. 7th Cir., page 764, where the Court said:

“Estoppel: Failure of counsel to distinguish between laches and estoppel may account for some of the confusion which appears in that part of the brief devoted to a discussion of this defense. Appellee contends that it made many spark plugs of the kind and description now complained of, to the knowledge of appellees and without opposition, and that because of appellee’s delay in insisting upon its rights it is now estopped to assert its monopoly. * * * True, laches may be one, and a most important element in proving estoppel, but ordinarily, where laches alone is shown, patentee should not

be barred from asserting his rights under the patent so far as future infringements are concerned, though he may, because of that fact alone, be refused damages for past infringements. *McLean v. Fleming*, 96 U. S. 245, 257, 24 L. Ed. 838; *Menendez v. Holt*, 128 U. S. 514, 523, 9 Sup. Ct. 143, 32 L. Ed. 526."

See also *Beattie v. Smith*, 275 F. 164, C. C. A. 2nd Cir.

On the question of laches the *Los Alamitos Sugar Co.* case, 173 Fed. 280, is directly in point; except in the sugar case the delay in bringing suit after notice was very much longer than in this case. There your Honors said:

"We cannot see that the court below erred in ruling against the appellant's plea of laches. No question in respect to profits or damages is involved on this appeal, the question of the appellee's right to the injunction awarded only being involved. The record shows not only that the contractor employed to build the appellant's dumping apparatus made several examinations of that of Carroll, taking some notes and drawings thereof before undertaking to construct the appellant's device, but that the manager of the appellant company had also a talk with Carroll in respect to the latter's apparatus, and that the manager, on the 12th of June, 1897, was notified in writing by Carroll of the issuance to him of his letters patent, and was expressly warned against infringing upon them."

Manifestly there has been no such unreasonable delay by Gilchrist considering his health, war conditions, etc, in bringing this suit as would justify a

Court of Equity refusing to grant relief to plaintiff on the ground of either laches or estoppel.

OTHER DEFENSES.

While there was a formal defense of non-infringement interposed to the 1910 patent, there is nothing in the record really to support that defense; the imitation of defendant being so close that if it is not a Chinese copy, it constitutes merely a "colorable evasion". It may, therefore, be assumed that infringement is admitted. Of course, under such circumstances the only thing a defendant can do is to defeat the patent utterly, and for this purpose there is invoked the usual defenses of "aggregation", "lack of invention", "anticipation", "prior publication", "prior use", etc.

As to the alleged defense of "aggregation" we need only point the rule recognized frequently by this Court and discussed in the case of *Willard v. Union Tool Co.*, 253 Fed. 48, 53, where it was said:

"The mere fact that human agency intervenes in an operation does not render a combination unpatentable. Nor is it necessary that the action of the elements be simultaneous. *Pelton Waterwheel Co. v. Doble*, 190 Fed. 760, 111 C. C. A. 488; *Burdett-Rowntree Mfg. Co. v. Standard Plunger E. Co.* (C. C.), 196 Fed. 43; *Novelty Glass Mfg. Co. v. Brookfield*, 170 Fed. 946; 95 C. C. A. 516; *Krell Auto Grand Piano Co. v. Story & Clark Co.*, 207 Fed. 946, 125 C. C. A. 394. Nor is it necessary that one of the constituent elements shall so enter into the com-

bination as to change the action of the others. *International Mausoleum Co. v. Sievert*, 213 Fed. 225, 129 C. C. A. 569. *It is sufficient if there be some joint operation performed by the elements producing a result due to their co-operative action.* *National Cash Register Co. v. American Cash Register Co.*, 53 Fed. 367, 3. C. C. A. 559; *Toledo Computing Scale Co. v. Moneyweight Scale Co.* (C. C.) 178 Fed. 557; *New York Scaffolding Co. v. Whitney* 224 Fed. 452, 140 C. C. A. 138; *Ohmer Fare Register Co. v. Ohmer*, 238 Fed. 182, 151 C. C. A. 258. And the result itself need not be new. It is sufficient if an old result be produced in a more 'facile, economical, or efficient way.' *New York Scaffolding Co. v. Whitney*, *supra*; *Pelton Water-wheel Co. v. Doble*, *supra*." (Italics ours.)

Here of course there is the most intimate co-operation and interrelation of the parts of the patented combination.

The oral testimony offered by defendant and the manner it was educed recalls the criticism of the Court in *Brown v. Zaubitz*, 105 Fed. 244:

"The defendant has called eight witnesses to corroborate his statements. They were examined in 1898 and testified regarding matters which transpired from five to eleven years before. The general course of the examination was to place in their hands the infringing pyrometer and ask them to compare it with the pyrometers which they saw eight, nine or ten years previous. It is unnecessary to discuss this testimony in detail. * * * The Supreme Court had the same situation to deal with in the telephone cases, except that there the alleged anticipation was established by testimony infinitely stronger than that produced here. In rejecting it the Court said: 'We do

not doubt that Draubaugh may have conceived the idea that speech could be transmitted to a distance by means of electricity, and that he was experimenting upon that subject, but to hold that he had discovered the art of doing it before Bell did would be to construe testimony without regard to 'the ordinary laws which govern human conduct'. Telephone Cases, 126 U. S. 567, 8 Sup. Ct. 778, 31 L. Ed. 863.

"It is not necessary to denounce these witnesses as perjurers. A much more demulcent and charitable view is that they are mistaken either as to the details of the pyrometer which they saw, or the time when they saw it. The desire to aid a friend, the actual presence of the infringing pyrometer, and the assurance of the defendant that the prior pyrometers were like it in structure may have encouraged imagination to encroach upon the domain of fact; but this is a condition frequently encountered in patent causes. The witnesses may honestly have thought that they saw the platinum strip in a pyrometer made by the defendant prior to 1892. They are in all probability mistaken, but at least there is a doubt about it, and this doubt destroys the force of the defense."

The reasons why evidence of this character should be weighed with extreme caution is well stated in *Campbell Printing Press & Manufacturing Co. v. Marden*, 64 Fed. 785, where the Court said:

"I cannot find an anticipation on evidence of this character, except in very extreme cases which it is not necessary or indeed practicable now to describe. I will not say that there may not be a case in which evidence of this character may be persuasive. But the essential objection to finding an anticipation under circumstances like the present is as follows: The witnesses, assuming that they intend to speak the truth—

an assumption which I readily make in this case, as I perceive nothing in the evidence to the contrary—are still, by the very necessity of the case, in a position where mistakes are easily made, and their evidence therefore should be received with great caution. The witness is familiar, in most cases, and notably so in this case, with the device which was patented subsequently to the construction of the machine which is alleged to be an anticipation. In recalling to his memory the construction of the earlier machine, he necessarily has in mind the instruction which he has received from the progress of the art in the meantime. It is, therefore, easy for him to transfer to his early device, the characteristics which he now clearly sees are necessary to the accomplishment of the purpose which was then in mind, and difficult for him accurately to separate his recollection of the machine which was made from his present knowledge of the machine which ought to be made. The inventor who has perfected his invention and described it in his application is entitled to the benefit of the presumption that he is the first inventor; and it seems to me most dangerous to find that he is anticipated except on the most reliable evidence.”

THE PATENT IN SUIT.

No claim will be made on this appeal that the Gilchrist patent is a broad pioneer patent. It did, however, represent such an advance in the art and fill such a “long-felt want” as to lay the foundation, in a large measure, of both of plaintiff-appellant’s business and defendant-appellee’s business and to make possible the commercial development of high lead logging.

The lower Court recognized the merit of the invention but held that because all of the elements of the claims in question were individually old in themselves in the prior art, the patent was void for aggregation and lack of invention. The object of this appeal, of course, is an attempt to correct that error. Judge Bean says (R. 26):

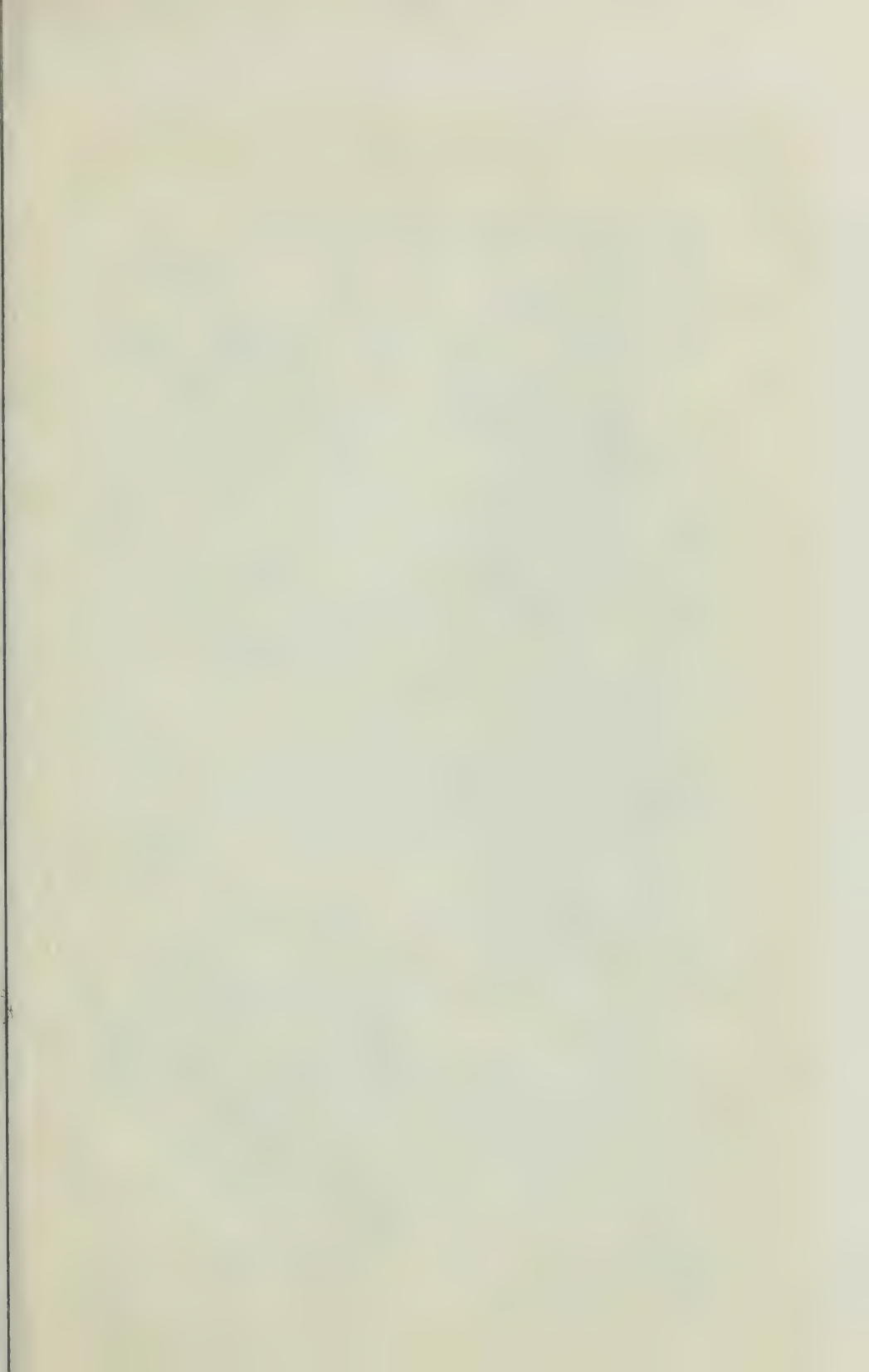
“In reaching this conclusion, I am not unmindful of the presumption of the validity of the patent arising from its issue, or that the auto-lubricating block manufactured by plaintiff has proven its superior utility in the logging business.”

Turning to the Gilchrist patent, complainant's Exhibit 1, set out in Volume II of Exhibits, page 3, the patentee states his problem as follows (page 1, lines 8 to 23, inclusive):

“The pulley block forming the subject matter of this application may be employed under a variety of conditions which will readily suggest themselves to a rigger. However, it may be explained that in logging operations, the line whereby the logs are dragged from the woods to the saw mill, or to the drive, is returned over a series of pulleys, commonly suspended at a considerable elevation. These return pulleys are in constant rotation, and on this account frequently run hot. Owing to their elevated positions, it is difficult to oil them, the oiling process commonly being deferred until it is often found that the pulley has run hot and bound.”

He then states his objects (page 1, lines 24-29):

“It is the object of this invention to provide a pulley which will contain a considerable quan-



J. E. GILCHRIST.

PULLEY BLOCK.

APPLICATION FILED MAR. 23, 1910

977,613.

Patented Dec. 6, 1910.

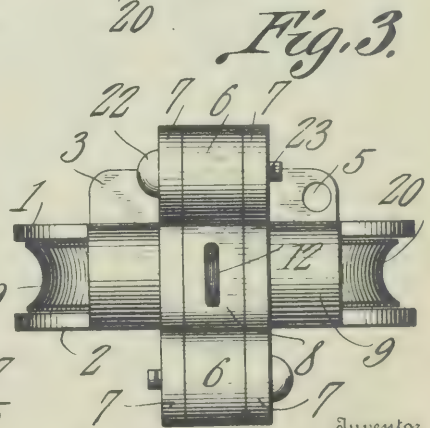
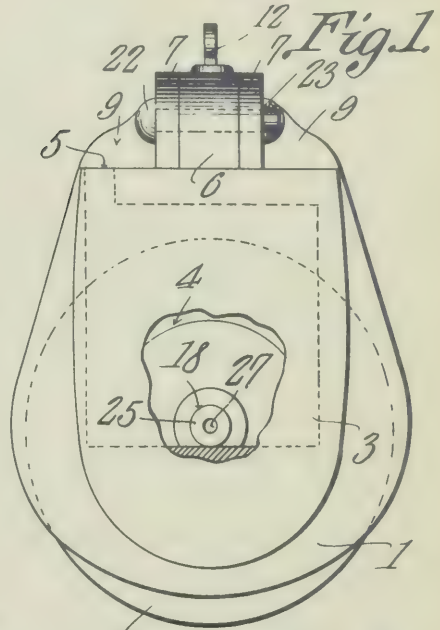
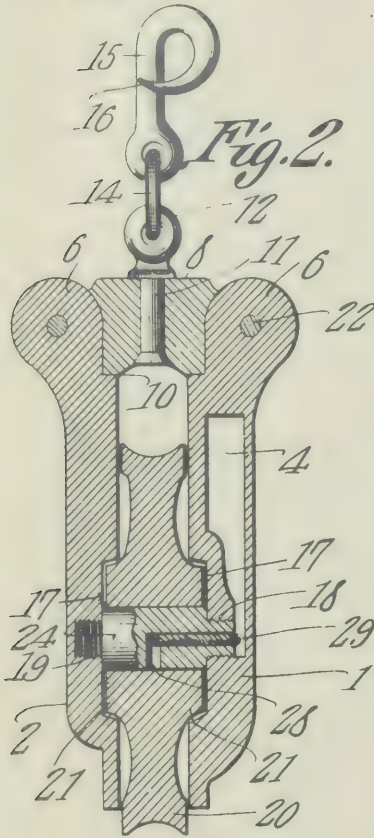
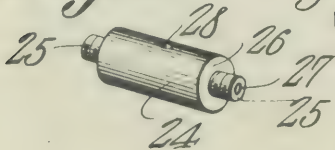


Fig. 4.



Inventor
John E. Gilchrist.

Witnesses

E. J. Stewart
Marion B. Lawton.

By C. A. Snow & Co.
Attorney

tity of lubricant, and feed the same, *automatically*, and *slowly*, upon the bearing pin of the pulley.

“* * * to provide a pulley, the bearing pin of which is *adequately protected against dirt and dust.*” (italics ours.)

We thus find four prime objects:

(1) This block must hold “a considerable quantity of lubricant”; otherwise it would require refilling just like the old grease cups did.

(2) It must feed “automatically”; otherwise it would require personal attention like the oiling means of the prior art.

(3) It must feed “slowly”; otherwise it would quickly lose its lubricant.

(4) It must be constructed so as to be “adequately protected against dirt and dust”; otherwise the bearings would soon cut out and destroy the pulley.

We will see from the evidence that there was not a single block, either on the market, or patented, described, or known, prior to Gilchrist, that would accomplish these objects.

The patentee then describes his block by reference to the drawings as comprising “parallel sides 1 and 2” (see Fig. 2); the side 1 being made hollow to form an integral interior oil chamber or reservoir 4. This chamber and its top inlet 5 for filling it are shown in dotted lines in the plan view of the block (Fig. 1) and also appears in Fig. 3; the patentee saying that the chamber is provided with “an inlet

5 communicating with the chamber 4, and constituting a means whereby a lubricant may be introduced into the chamber”.

When we come to look at the defendant's structure we see that defendant has each of his sides provided with oil reservoirs, so that he carries double the amount of oil that the Gilchrist block provides for, but, of course, that is not a material difference.

The sides 1 and 2 are provided upon their upper edges with outstanding projections 6 which fit between the lugs 7 of the top member 8. Registering perforations in the projections 6 and lugs 7 are adapted to receive the locking pins 22. The construction, as the patentee says (page 1, lines 78-80), “being such that the sides 1 and 2 are hingedly connected with the top 8, by means of the pins 22”. A hook 15 or other equivalent attaching means is swiveled in the top 8, as shown at 11, Fig. 2. 20 is the pulley wheel mounted on the axle or bearing pin 24, which latter, as seen in Fig. 2, has reduced threaded ends 18-19 screwing into the adjacent faces of the opposed sides 1 and 2.

By screw-threading the ends of the axle or bearing pin 24 into the sides, it is manifest that the bearing pin is held against rotation. Moreover, by having the ends 18 and 19 of the bearing pin reduced, corresponding shoulders 26 (shown in Fig. 4) are provided, and which shoulders or stepped portion 26 of the bearing pin 24 are adapted to screw up tight against the inside faces of the sides 1 and 2

and not only exclude dirt but more particularly *brace the sides against collapse*.

Furthermore, by this stepped-end construction of the bearing pin, it is possible to use a good sized pin with a correspondingly *greater circumferential area* and a like large axle bore in the pulley 20. This tends to *long life* of the pulley or giving a greater bearing surface than if an ordinary straight pin were used or if the pulley and pin were made integral and the ends of the pin turned in bearings. In either of the latter instances, that is a small stationary pin with a limited bearing area or a rotating pin turning in end bearings, there would be excessive wear.

Since these blocks work at *high speed* and under *terrific strains*, the pulley wheels must have as *long a bearing* as possible. To that end it is noted that the pulley 20 has a *long hub bearing*, designated as 21 in the drawing; the length of this hub being considerably in excess of the width of the face of the pulley 20. The ends of the hub are accommodated in *recesses* 17, with the walls of which recesses they have a *snug but anti-friction fit*. This recessing of the hubs in the walls of the sides provides a *protection against the entry of dirt and dust* into the bearings between the rotating pulley wheel 20 and the stationary axle 24.

In Fig. 2 it is observed that one end of the bearing pin 24 projects into the bottom of the oil chamber 4 and that there is an annular oil channel or

hole 28 made in the bearing pin 24 which is partially filled with wicking 29. This wicking provides for the *slow* feed of the oil from the oil reservoir 4 to the surfaces to be lubricated. All these features are described fully and adequately in the specifications.

For instance, the patentee says (page 1, beginning line 3):

“In the adjacent faces of the sides 1 and 2, are annular recesses 17. At the centers of these recesses 17 are threaded openings 18 and 19, the opening 18 in the side 1 being extended into the chamber 4, at the lower end thereof; while the threaded opening 19 in the side 2 terminates within the contour of said side.”

Continuing, the patentee, after referring to the shoulders 25, says (page 2, lines 10-17):

“The sheave 20 is adapted to be journaled for rotation upon the bearing pin 24; and this sheave 20 is provided upon its outer faces with bosses 21, adapted to fit closely, yet anti-frictionally, in the recesses 17 of the sides 1 and 2. The shoulders 26 upon the pin 24, prevent the sides 1 and 2 from bearing against the sheave 20.”

Referring to the means for lubricating the pins and for controlling the flow of the lubricant thereto, the patentee says (page 2, beginning line 18):

“In the bearing pin 24, there is an axial opening 27, communicating at one end with the chamber 4. Adjacent the middle of the pin 24, this axial opening 27 is extended through the side wall of the pin, and shown at 28. A packing of some sort, denoted by the numeral 29,

and preferably a piece of cotton wicking, is mounted in the axial opening 27 of the bearing pin."

Continuing, the patentee says (page 2, beginning line 27) :

"In practical operation, the lubricant is introduced into the chamber 4 through the inlet 5. The lubricant will find its way slowly through the axial opening 27 of the bearing pin 24, and, passing out through the portion 28 of the opening in the pin, will serve to lubricate the sheave 20 as the same rotates upon the pin. The presence of the packing 29 in the interior of the bearing pin 24, serves to regulate the flow of the lubricant through the pin."

Regarding the hinge action of the top 8 to permit a rope to be looped over the pulley wheel without dismantling the block, the patentee says (page 2, lines 55-73) :

"Obviously, when the sides 1 and 2 are separated, the top 8 need not be entirely removed from both of the sides. But one of the pins 22 may be removed, the top 8 being swung back pivotally upon the other pin 22 to permit the side from which the lugs 7 have thus been freed, to be rotated.

"It will be seen that the construction of the device is such, that, although the chamber 4 may be entirely filled with lubricant, the top 8 may be unshackled from the side 2, permitting the said side to be rotated free from the bearing pin 24, whereupon the sheave may be removed, and the pulley block repaired, without materially changing the position of the oil holding side 1 of the pulley block or emptying the chamber 4 of its contents."

As further emphasizing the protection of the bearing against the entry of dirt the patentee says (page 2, lines 74-79):

“The parts 21 of the sheave 20 fit closely in the recesses 17 of the sides of the block, and the bearing pin 24 is so housed and protected that dirt will be prevented from accumulating about the bearing of the sheave, to interfere with the rotation thereof.”

The need of just such a construction as thus described in the patent is shown by this account of the practical difficulties of working conditions, by Mr. Tyler, an old-time logger (R. 152-153):

“* * * in the use of logging blocks the pull is in every kind of a way you conceive of; with a side thrust pull on a narrow sheave with narrow axle bearing it would mash it right out, would naturally squash it right out on that side; the recesses of the sides and the hubs of the sheave projecting into the recesses in the Gilchrist and Mallory blocks are of benefit for the simple reason it not only protects the block from dirt and dust, keeps it out of the bearings, but it gives a longer bearing on the pin without putting extra weight into the block, you have a stronger block without extra weight by lengthening the hub of the sheave, if you don't do that, in order to have the strength in your block, you would have to have a sheave so big you couldn't do anything with it; in the use of blocks in the woods there is every chance for dirt to get into the block, for it is dragged through the ground, over rocks and sand, and everywhere it could be, to get a chance to get dirt.”

THE DEFENDANT'S STRUCTURE.

There are several specimens of the defendant's infringing devices in evidence, as there are likewise several full-sized blocks of plaintiff. The infringing structure is well illustrated by the drawing of the Mallory block Plaintiff's Exhibit 3) and also shown in the Mallory catalogues (Plaintiff's Exhibit 4) and the Mallory logging blocks (Plaintiff's Exhibits 5 and 6). The sale of these blocks is not denied.

Mr. Younie, chief engineer of the Puget Sound Iron & Steel Works and long a designer of logging blocks, testifying for the plaintiff, stated (R. 45) that the drawing of the Mallory block (Plaintiff's Exhibit 3) is an accurate representation of the structure of Plaintiff's Exhibit 6, except as to the upper part of the drawing with reference to the cross-head; that the operation of the Mallory block is identical with the operation of the Gilchrist block, the Mallory block merely having an oil chamber in each side so that the pin has two openings for the passage of oil from each of the oil chambers to the sheave. The operation of the two blocks is identical.

Quoting further from the Record, pages 46-47:

“Witness (Mr. Younie) further compared the Mallory and Gilchrist sheaves and showed wherein they were identical, each having a long extended hub reaching out into the annular recesses; that the function of the long bearing was to increase the bearing surface and reduce the bearing pressure, the amount

of pressure per square inch; that logging blocks are subject to terrific strains and loads and if the bearing is narrow, the pressure is so great as to squeeze out the bushings. That the annular recesses of the sides function to provide for the extended length of the pin and the increased area of bearing surface and to accommodate the long hub; also such recesses function to make the block a little less accessible to dirt and foreign matter, and dirt would tend to roughen the surface of the pin, wearing the same out more rapidly than if the bearing were kept clean.

“Witness compared the Mallory pin with the Gilchrist pin and stated that the function of each is identical in that each holds the sides of the block in proper position by having the sides rigidly secured against the shoulders of the pin; that the Mallory pin differs from the Gilchrist pin only as to the number of openings for the admission of oil from the oil chambers; that their functions are absolutely the same.”

THE QUESTIONS OF INVENTION AS WELL AS INFRINGEMENT HAVE OFTEN BEEN DETERMINED BY CONSIDERING WHETHER THE DEFENDANT'S DEVICE IS MORE LIKE THAT OF THE PATENT IN SUIT THAN THE ALLEGED ANTICIPATIONS. (Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 118 Fed. 136; National Hollow Brake-Beam Co. v. Interchangeable, 106 Fed. 707.)

In the present instance, as far as the evidence goes, the only self-oiling blocks in use today are the devices of the plaintiff and the defendant. The defendant, although free to adopt any or all of the ancient devices, nevertheless when it came to build its machine and to construct a self-oiling block

which would automatically take care of itself for commercial, practical purposes, copied the patented device of plaintiff rather than anything else in the prior art. This of itself strengthens evidence of invention (cases *supra*).

THE MALLORY ADVERTISEMENTS.

There are in evidence several pages from different issues of the "Timberman" as "Complainant's Exhibit 35", which show varieties of the Mallory advertisements. Thus for January, 1916:

"The universal use of high leads make these blocks of valuable consideration to every logger. In connection with their *auto-lubricating feature*, the *wide throat*, which permits full passage of rigging, the *heavily constructed sides*, large *strong shackle* and *reinforced manganese steel sheaves*, recommend them for most severe service." (italics theirs.)

Again, March 1916:

"The auto-lubricating feature allows the block to run from a week to ten days without attention, which means a great saving where block is in an inaccessible place."

Again, June, 1919:

"The trip line corner block pictured here embodies features that every logger will appreciate. *Loug bearing* manganese steel sheaves heavily ribbed. *Large oil reservoirs* with capacity for several days' *constant operation*. A *wide sheave* that gives ample *clearance* for

straw line connection, and the *extra long bearing* insures a cool running block under all conditions." (*italics ours.*)

Contrast this with March, 1914, issue, ad. of Mallory, which shows *old style non-lubricating* (Plaintiff's Exhibit 12).

See cut of Mallory, April, 1914, with self-oiling lug bearing, etc., with wick packing and all.

Plaintiff's Exhibit 14, ad. of Mallory, October, 1915, issue, says:

"Certain principles of their construction are protected by patents upon which the counterfeiter cannot safely infringe."

What does that refer to? Certainly none of their own patents, for they have none except a design patent or two.

Again, Mallory's 1917 catalogue, Plaintiff's Exhibit 4, in "*Introduction*", says:

"The development of logging equipment for Pacific Coast conditions has been marked by a succession of well-defined steps from the first introduction of donkey engines to the more recent methods of skyline and high lead yarding.

During this evolution the improvement in logging blocks has played a most important part", etc.

It is manifest, in running through these advertisements, that there is a well-developed tendency of the defendant to take all the credit of this block development to itself.

And still, as said recently in *Beattie Mfg. Co. v. Smith*, 275 Fed. 164, 109:

“The fact that these advantages seem to be much appreciated by the trade, and that this new method of folding has rendered obsolete the prior method * * * is strong evidence of an advance in the art, and we think indicates invention.”

DEFENDANT GIVES THE TRIBUTE OF PRAISE TO THE PRIOR ART, BUT THE TRIBUTE OF IMITATION TO GILCHRIST.

This suit presents the not unusual situation pointed out by Mr. Justice McKenna in the *Rubber Tire Case* (*Diamond Rubber Co. v. Consolidated Rubber Co.*, 220 U. S. 441), whereby the defendant gives the tribute of his praise to the prior art but the tribute of his imitation to the plaintiff's patented invention.

“The prior art was open to the rubber company. That ‘art was crowded’, it says, ‘with numerous prototypes and predecessors’ of the Grant tire, and they, it is insisted, possessed all of the qualities which the dreams of experts attributed to the Grant tire. And yet the rubber company uses the Grant tire. It gives the tribute of its praise to the prior art; it gives the Grant tire the tribute of its imitation, as others have done. And yet the narrowness of the claims seemed to make legal evasion easy. Why, then, was there not evasion by a variation of the details of the patented arrangement? Business interests urged to it as much as to infringement. We can find no answer except that given by the tire company. The patented organization must be one that is es-

sential. Its use in the precise form described and shown in the patent must be inevitably necessary."

THE CLAIMS IN SUIT.

Claims 1, 4 and 5 charged to be infringed are as follows:

"1. A pulley block consisting of sides, one of which is provided with an interior oil chamber having an inlet adjacent the top of the block; a bearing pin terminally mounted in the sides and having an axial opening communicating with the chamber and extended through the side wall of the pin; and a sheave journaled for rotation upon the pin between the sides.

"4. A pulley block consisting of parallel sides having annular recesses in their adjacent faces, one of the sides being provided with an interior oil chamber having an inlet adjacent the top of the block; a bearing pin terminally threaded to engage the sides in the recessed portions thereof, the pin having an axial opening communicating with the chamber and extended through the side wall of the pin; a sheave journaled for rotation upon the pin and having oppositely disposed bosses adapted to fit closely but anti-frictionally in the recesses, the pin having shoulders to engage the sides to prevent the same from binding upon the sheave; and a top removably connecting the sides above the sheave.

"5. A pulley block consisting of parallel sides, one of which is provided with an interior oil chamber having an inlet adjacent the top of the block; there being a threaded opening in the wall of said side communicating with the chamber adjacent the bottom thereof, and an oppositely disposed threaded opening in the

other of said sides; a bearing pin terminally threaded to engage the threaded openings, the pin having an axial opening communicating with the chamber and extended through the side wall of the pin; a sheave journaled for rotation upon the pin; the sides having lateral projections at their upper ends; a top having spaced lugs between which the projections of the sides are adapted to fit; and removable means for uniting the projections with the lugs."

Claim 1, while broader than claims 4 and 5, must, with respect to the "interior oil chamber", the terminal mounting of the bearing pin and the other elements therein mentioned, be construed with respect to the meaning that those terms have as used in the Gilchrist specifications and as shown in the drawings.

The fundamental rule of claim construction is that the claim should, if possible, be construed to cover the actual and entire invention of the patentee (*Los Angeles Art Organ Co. v. Aeolian Co.*, 143 Fed. 880, C. C. A. 9th Circuit).

What the "actual and entire invention" of the patentee is can only be ascertained by reference to the specifications and drawings. Thus in interpreting the broad and general language of a claim it is proper and necessary to refer to the specifications and to confine the meaning of the claim to such a combination and to such elements as will produce the desired result, with the elements functioning in the manner of the inventor's concept.

Thus Robinson on Patents, Vol. II, page 498:

“In thus construing the claims of a patent by its descriptive portions, the scope of the claims may often be restricted, but can never be enlarged. The claims are based on the description, the invention secured to the patentee being always identical with or contained in that communicated to the public; and therefore the interpretation given to the claims must limit them to the invention previously described, however wide and comprehensive they might otherwise appear.”

In the case of *Anderson v. Collins*, 122 Fed. 451, the patent related to a roller bearing and the 10th claim defined “roller elements located in the race formed thereby, ball separating devices between the roller elements of the housing, for confining the roller elements”. The prior art was such that the claim was anticipated unless the roller elements were construed narrowly to be balls and not wheels or cylinders, and unless the ball separating devices were construed to be rotating ball separating devices. The Court, in order to save the claim, construed the roller devices to be ball roller devices, and the separating devices to be rotating separating devices. The Court’s statement as to this question is as follows:

“Much has been said in argument and written in the briefs to show that the tenth claim of the patent in suit is so broad and general in its terms that it covers devices in which the main bearing elements are cylinders or wheels, and in which the separating devices are not rotatable; and that, when it is read in this way, the combination it describes is anticipated by

several of the patents to which reference has been made. But the claims of a patent must be read in the light of the specification which accompanies them. The specification may always be referred to to restrict, though not to expand the claims. And, when this tenth claim is read in the light of these familiar rules, its true construction limits it to a housing for the balls and the rotatable separating devices between them described in the specification; and when it is thus read no anticipation can be found in the prior patents.”

The Court of Appeals of the Sixth Circuit (Lurton, Day and Severns sitting) has also enunciated the same principle very emphatically in the case of *Lamb Knit Goods Co. v. Lamb Glove & Mitten Co.*, 120 Fed. 267. In that case the subject-matter involved was a glove, and the prior art was such that, unless the glove was construed to be a *knit* glove, the claim was anticipated by the prior art. Claim 1 did not specify a knit glove or knit fabric, but read as follows:

“1. A glove formed of two blanks, the hand blank having finger pieces formed thereon, and narrowed at the point where the thumb is attached, and of a uniform width from the thumb to the wrist, and the thumb blank having its upper portion knit goring, substantially as described.”

The Court held that, in view of the specification and the drawings, the claim should be construed narrowly to refer to a *knit* fabric, such construction being given in order to save the claim from an-

ticipation. The Court's statement in the case is as follows:

"It is the settled rule in patent law that claims must stand or fall as made (*Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274, 278; 24 L. Ed. 344); but it is equally well settled that the claims of a patent are to be construed by reference to the specifications (of which the drawings form a part), and that such reference may be had, not for the purpose of expanding the claim, but for the purpose of defining it and limiting it to the description of the invention (*McClain v. Ortmyer*, 141 U. S. 419; 12 Sup. Ct. 76; 35 L. Ed. 800; *Howe Mach. v. National Needle Co.*, 134 U. S. 388; 10 Sup. Ct. 570; 33 L. Ed. 963; *Coupe v. Royer*, 155 U. S. 565; 15 Sup. Ct. 199; 39 L. Ed. 263; *Tilghman v. Proctor*, 102 U. S. 729, 730; 26 L. Ed. 279.) And within certain limits the courts are inclined to adopt this mode of construction when it is necessary, as in the present case, to save the patent from the objection that the claims are too broad. *Rubber Co. v. Goodyear*, 9 Wall. 788, 795; 19 L. Ed. 566; *McClain v. Ortmyer*, *supra*; *Coupe v. Royer*, *supra*, 577; *Soehner v. Stove Co.*, 28 C. C. A. 317; 84 Fed. 182."

The Supreme Court has squarely and unequivocally indicated that it approved of the doctrine of construing claims more narrowly than their terms, in view of the specification (*Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S. 403). The process of the patent in suit in that case referred to the mixing of metal from blast furnaces, but the second claim said nothing about metal from blast furnaces, but merely specified "the art of

mixing molten metals to secure uniformity of the same in its constituent parts preparatory to further treatment". The Court held that the specification should be referred to to ascertain the character of the metal, and that "the metal" should be construed to mean metal from blast furnaces, and not from *cupolas*, there being considerable question, in view of the art, as to the validity of the claim if construed broadly enough to cover the mixing of metal from *cupolas*. We quote below the statements of the Court upon this point:

"The second claim apparently extends to the art of mixing all molten metals, but the specification, taken in connection with the disclaimer, which describes a process designed to dispense with the use of *cupolas*, shows that it was intended to include metal tapped from blast furnaces and was probably intended to be limited to that. Whether the claim would be void if construed to include *cupola* metal, it is unnecessary to consider. It clearly includes metal from blast furnaces, and is not rendered void by the possibility of its including *cupola* metal. The claim of a patent must always be explained by and read in connection with the specification, and as this claim clearly includes metal taken from blast furnaces, the question whether it includes every molten metal is as much eliminated from our consideration in this case as if it were sought to show that the word 'metal' might include other metals than iron. Were infringement charged in the use of an apparatus for mixing *cupola* metal, the question would be squarely presented whether the claim had been illegally expanded beyond the specification."

The Circuit Court of Appeals for the Eighth Circuit in *Brammer v. Schroeder*, 106 Fed. 918, 929, speaking of the interpretation of claims, says:

“It is true that neither they nor the specification can be read to expand the claim; but the specification and the drawings must be read together, and given their obvious force and meaning, for the purpose of determining what devices are pointed out and described therein. When the specification and drawings of this patent are so read, the extension of the driving shaft beyond the pinion so that it will engage with the flange on the cylinder, and every other mechanical device requisite to unite the essential elements of the combination claimed, and to make it complete and operative, are plainly pointed out and described.”

On this same point Judge Gray in *Washer Co. v. Cramer*, 169 Fed. 629, speaking for the Circuit Court of Appeals, conceded that the terms of one of the claims of the patents there in suit was fully met by the prior art,

“*if we stick in the bark by looking at the language of the claim, dissociated from the specifications; but no invention can be practically or fairly understood or explained, if such dissociation is absolutely adhered to.*”

Nevertheless the claim was held valid. Consequently when we come to consider the prior art and seek to compare it with the Gilchrist claims, we have to keep in mind the meaning of the elements used in Gilchrist *as defined in Gilchrist's specifications*, and to measure the *entire invention of Gilchrist* with that which it is sought to show as an anticipation.

INVENTION.

The Honorable Court in holding the Gilchrist patent invalid says (R. 27) :

“The question whether a patent involves invention is one of fact for the Court, to be answered in the light of all the pertinent considerations including the prior art, and so viewing the complainant’s patent I am of the opinion that it is invalid for want of invention.”

This immediately raises two questions:

1. What is invention?
2. What are the facts under which invention or lack of invention is to be predicated?

No better definition, to our knowledge, has ever been given of “invention” than the short one that “It is the production of new means to fill a want”.

The second question would be answered, apparently, by an ascertainment of the “want”, provided such a “want” existed in fact; and whether or not, as a matter of fact, the invention in suit had fulfilled the “want”. If there was a want and the prior devices fell short of fulfillment, then there must have been left something for subsequent inventors. True, it may have been only the “last step” to convert failure into success, but that has often been held to be the touchstone defining invention.

Barbed Wire Patent, 143 U. S. 275;

Expanded Metal Patent, 214 U. S. 366.

Complainant enters this Court with the presumption of law that his patent is good and valid and

covers patentable subject-matter over everything theretofore known. This presumption arises from the grant and issuance of a patent and is a statutory presumption. In any case where the question of patentable novelty is close or in *doubt*, this presumption, arising from the grant and issuance of the patent, must throw the decision in favor of the validity of the patent, so that if there were any *doubt* as to the patentability of the subject-matter of the patent in suit this *prima facie* presumption must control and the patent must be held valid (Morgan v. Daniels, 153 U. S. 120; Cantrell v. Wallick, 117 U. S. 679).

And this presumption is of such legal effect that

“Evidence to overcome the presumption of invention arising from the issuance of the patent must be conclusive on the question.”

Enc. of Evidence, fol. IX, page 627;

Wilkins Shoe B. F. Co. v. Webb, 89 Fed. 982;

Regina Co. v. New Century Music Box Co., 138 Fed. 903.

Or, as otherwise stated, in order to overcome this presumption arising from the grant and issuance of the Letters Patent, the proof offered by defendant must be both reliable and certain. In case of any doubt the presumption must control the finding of fact (Osborne v. Glazier, 31 Fed. 402; Edward Barr Co. v. Sprinkler Co., 32 Fed. 80; Walker on Patents (4th Ed.), Sections 491, 494; Robinson

on Patents, Section 423; *Harper & Reynolds Co. v. Wiltus*, 56 Fed. 588; *Hunt Bros. Fruit Packing Co. v. Cassidy*, 53 Fed. 259 (C. C. A. 9th Cir.).

If the prior art failed of success and the device of the patent succeeded where there had only been failure previously, then there can no more be "anticipation" or "lack of invention" in the patented device than can a patented failure be infringed by a successful machine. In other words, a successful machine cannot find its equivalent in an unsuccessful one. That is as true in testing the validity of a patent as it is in measuring infringement.

American v. Fibre, 90 U. S. 566; 23 L. Ed. 31;
Gordon v. Warder, 150 U. S. 47; 37 L. Ed. 992.

It is a well-settled rule of law that

"the unsuccessful experiments of others tend to show the exercise of inventive genius by the one who first produced a successful result."

Ham Co. v. Dietz Co., 13 C. C. A. 690.

As said in *General Electric Co. v. Wagner Electric Co.*, 130 Fed. 772:

"Where a prior device is set up as an anticipation of the complainant's patent and it appears that the defendant did not use or improve upon it, but adopted complainant's, the prior device is not an anticipation."

Evidence of doubtful probative force will not overthrow the presumption of novelty and orig-

inality arising from the grant of letters patent for an invention.

- Smith v. Fay, 6 Fis. Pat. Cas. 446;
 Hawes v. Antisdel, 2 Bann. & Ard. 10;
 Patterson v. Duff, 20 Fed. 641;
 Wood v. Cleveland R. M. Co., 4 Fish. Pat. Cas. 560;
 Parham v. American B. O. & S. Mach. Co., 4 Fish. Pat. Cas. 482;
 United States Stamping Co. v. Jewett, 18 Blatchf. 469; 7 Fed. 869;
 Clark Thread Co. v. Willimantic Co., 140 U. S. 488 (35: 521).
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THE "WANT" EXISTING BEFORE THE ADVENT OF GILCHRIST.

In order to arrive at any just estimate of the Gilchrist patent, it is first necessary to understand the environment in which the invention is used and the practical conditions and want that brought it into being.

Scarcely any subject is more prosaic or of more ancient ancestry than that of the pulley. On the other hand, scarcely any subject of modern commercial life is more endowed with thrills than is the particular logging systems with which the Gilchrist patented pulley is so intimately associated. The history of the Gilchrist pulley block constitutes an important chapter in logging, as those operations are carried on in the forests of the Northwest.

The story of the development of logging is best told in the words of the witnesses themselves. Thus Mr. William Tyler (R. 150 et seq.):

“When I started logging, horses and oxen were used and logging with steam donkeys came in about 1902 or 1903; the first logging blocks used were pieces of scrap iron made in camp, the system being to oil them with the squirt can; and you had to oil them every time you made a pull on them, and if you didn’t, you wouldn’t have any block; if the camp was any size it took a man steady to oil the blocks; the first blocks had no extra width in bearing.

“The next improvement of blocks came about 1904 or 1905, when the compound or grease cup block was introduced; this was a block put out by the Bouse people, with a plug in the end of the pin; you could put a little compound in there and screw down the plug; then a little later another kind of a block came out with a cup which you screwed down with a regular cap, not an elbow, they didn’t use them things, just used a sleeve on it, put a sleeve on where they had that elbow; the compound was hard grease which was forced in with pressure; these compound blocks stayed in general use until we got the Gilchrist block.

“The first Gilchrist block I used was in the spring of 1910; the high speed donkey engine came in along about 1905 or 1906; the grease cup block was not a satisfactory appliance to work with a high speed engine, because you couldn’t have a man around all the blocks and keep the cups turned down to keep the blocks from burning up; you had to have something that would oil itself; you would have to send a man around to turn down the grease cups about four times a day, twice in the forenoon and twice in the afternoon; in a big camp that would keep 3 or 4 men busy. The line runs

through these blocks with a fast engine pretty close to a mile a minute; my actual experience with a grease cup block shows that they would not stand up under this high speed work; we were worrying along with a grease cup block before we got the Gilchrist block; prior to the use of the Gilchrist block I had never seen a self-oiling block of that type and had never heard of it; if I had I would have bought one.

“The Gilchrist block has been a perfect success.”

Continuing he says (R. 153):

“I have been around other camps and the Gilchrist type of self-oiling block is being used everywhere that they can get hold of them; *I would not buy any other kind of blocks and have all that type of blocks in my camps*; I am using the self-oiling style of block rather than the old grease cup block, because the grease cup block costs a man too much money; he would be buying repairs all the time; they are no good after you get them.” (italics ours.)

THE HIGH-LEAD SYSTEM.

Referring to the high line lead he says (R. 155):

“I am familiar with high-lead logging; in ground logging the logs are dragged right on the ground; in the high-lead work one of these big blocks is hung up in the top of a tree, as high as 200 feet, and the main line is run through this block; then they hook onto the logs and the main line brings the logs in towards the spar tree, leading the nose of the log off the ground, the closer to the gin pole or spar tree the higher the nose of the log; that is what is meant by high-lead work,—the leading of the nose of the log high off the ground. * * *

"The high-lead block is up in the air from 140 to 200 feet, and the men who climb up the trees to adjust these blocks are specialty men whom we have to pay large wages to; it is dangerous work, with lots of chances; the ordinary logger doesn't do that work at all, and the men have particular equipment, like the men who climb a telephone pole, to do the climbing. If you were using the grease cup block with the present speed of lines, you would have to send a man up to look after the block 5 or 6 times a day, and even then it would not work successfully; in my experience with grease cup blocks we burn them out, no matter what care or attention we might give them; but we don't burn out these self-lubricating blocks.

"Q. Now, tell the Court just whether or not this high-lead system of logging is an advance in the logging business, a step in progress?

"A. Yes, it is, for this reason, that you can take the same crew of men with high-lead, and you can put out at least a half more logs to a high-lead than you could on the ground in the same locality. It is a big advancement for that reason.

"Q. Is it a step that has come to stay in the art?

"A. I think it has, and all loggers that have made a success in the business says it has."

Your Honors in *Los Alamitos Sugar Co. v. Carroll*, 173 Fed. 280, in sustaining a patent for such a humble apparatus as a dumping wagon, where all of the elements were old, but where the united result was, as in the present case, exceedingly beneficial, quoted thus from *Loom Company v. Higgins*, 105 U. S. 580:

“It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention. It was certainly a new and useful result to make a loom produce 50 yards a day when it never before had produced more than 40; and we think that the combination of elements by which this was effected, even if those elements were separately known before, was invention sufficient to form the basis of a patent.”

DISADVANTAGES OF THE PRIOR ART.

Referring to the old type of grease cup blocks Mr. Tyler says (R. 157) :

“When these grease cup blocks would burn up we had to get another bushing and put in the sheave and fix the block up to go to work again, and while this was being done operations would be held up so that the men working on the line would be idle; if you had 15 or 18 men around there they would be idle until you got to going again; the self-oiling block does away with this suspension of operations.”

Referring to the hard usage that the high line lead gives to a block Mr. Tyler further says (R. 161-162) :

“The high-lead blocks hang in the trees, and when the line is tense would swing out from the trees, and when slackened up would slam up against the tree again; the blocks are swung so you can take them out of the tree and use either side; they are hung as close to the tree as they can be hung by a strap; some blocks

have swivels; most of them are not placed with swivels; the same side of the block would not bang against the tree if you turn it around, but the same side would bang as long as you could keep it that way; if the oil cup were on the outside of the block it would not hit against the tree, but the jar would knock it off; the reason we took off the elbows and put on the straight sleeve was so we could screw the plug up better; the sleeve had about the same capacity as the elbow and projected out about the same."

A "setting" or "set" is described by Mr. Tyler (R. 164):

* * * "by a 'set' in the woods we mean where we rig up a tree and yard all around it just as far as we can reach with our lines, that is one 'setting' in the woods; when this block is filled and hung up in the tree as a rule it will operate without oiling for that setting so that as a general rule you only have to oil or fill it when you have it on the ground and put it up."

In regard to difficulties and hazards of lubricating blocks used with a high lead the witness Tyler says:

"If you have to go up in a tree to oil a block, it would take a man probably about half an hour, to pull him up there and put the oil in and take him down; while this oiling was going on that part of the outfit would have to be closed down; we usually have one man in the camp who is called a high-lead man for that kind of work and we pay him extra; the work of oiling the high-lead blocks isn't a job for everybody to do; only now and then you get a man to do this kind of work; they require large wages.

“The type of *self-oiling blocks* has *practically displaced all other types of blocks entirely*, will in time; a good many outfits have discarded the other blocks altogether.” (Italics ours.)

MALLORY AND GILCHRIST BLOCKS INTERCHANGEABLE.

It is interesting to note that this witness makes no distinction between the defendant-appellee's device and plaintiff-appellant's device, as far as their construction and general utility are concerned. Thus he says (R. 152-153):

“Have used the Mallory self-oiling blocks interchangeably with the Gilchrist block, and I see no difference in the operation; the features of the self-oiling block which appeal to me are the strength of the material of the blocks, the building of the block, the mechanical work that is done on it, the guard which keeps our lines from cutting out the gooseneck, the self-oiling apparatus which makes it a cheaper block to operate, the better success with the sheave, it is self-oiling and it don't cut out, you don't have to buy bushings every two or three days to fix it up, it is always in condition; the extra width of bearing is of value because it gives the block more strength and renders it less liable to burn when under heavy duty; * * * the recesses of the sides and the hubs of the sheave projecting into the recesses in the Gilchrist and Mallory blocks are of benefit for the simple reason it not only protects the block from dirt and dust, keeps it out of the bearings, but it gives a longer bearing on the pin without putting extra weight into the block.”

And again (R. 164) :

“The Gilchrist or Mallory self-oiling block will hang in a tree in operation without oiling for a length of time depending upon the work which it is doing; if it is working hard, it will hang at least two weeks, and if not working hard it will hang longer.”

Mr. W. S. Cram, another witness, is a practical logger and manufacturer and is president of the Sunset Timber Company. His concern was, at the time of the trial, logging about seven or eight million feet a month. He told of his experience in the past 20 years leading up to the advent of the Gilchrist block. Thus at R. 172 he says:

“Have been interested in the logging business since 1902; am more or less familiar with logging blocks, using them in our camps since I have been engaged in the business; we first used a block with just two sides and a sheave which had to be oiled with an oil can; used that for about five years, I think; then later some one invented or brought into use what is known as the grease cup block and that was used for five or six years, and then self-oiling blocks of the Gilchrist type came into use; the first I ever heard of the self-oiling type of block was the Gilchrist block about five or six years ago; in the history of logging engines, when they first started, they used small engines and had much easier work; as logging progressed, the logging machinery was enlarged and improved and a great deal of trouble was experienced with the oiling of blocks; there was a good deal of time lost with the blocks heating and having to put in new pins and new sheaves, etc.; I think it was five or six years after the grease cup block came in until the self-oiling block came; during

that time of course progress was made in the size of the engines and the speed and everything else; the speed of the engines and machinery expedited logging so that we produced more logs."

HIGH LEAD SYSTEM PRACTICAL ONLY WITH THE PATENTED BLOCK OR DEFENDANT'S BLOCK.

Referring to the high lead he says (R. 173):

"Am familiar with the high-lead and sky-line system of logging, which we used to some extent in our operations; I regard the high-lead and sky-line systems as a step in the advance progress of the business of logging; it is becoming more popular all the time. With the high-lead system of logging it would be possible to use the old grease cup system, but not practicable; it would be very cumbersome and we would lose a great deal of time with it because we would have more or less heating of blocks and pins; the blocks on the high-line are not accessible, so that the trouble can be corrected; they are usually up out of the way where it is quite a trouble to reach them; *the self-oiling blocks have displaced the grease cup blocks with the big companies to quite a large extent, particularly on the high-lead work and in important places or hard places*; they are using the self-oiling block quite generally, I think; we are using quite a few of the self-oiling blocks and in the buying of new blocks today we are buying self-oiling blocks; *I don't think we are buying any other type of block*; am familiar with the logging industry to quite an extent in the State of Washington; it is my understanding that the self-oiling blocks are used quite generally in the logging industry." (Italics ours.)

His first acquaintance with self-oiling blocks was in 1909 (R. 178):

“I first heard of the self-oiling blocks in 1909, and I called on Mr. Gilchrist in South Bend and he showed me what he was doing with it; that was the first I ever heard of the self-oiling patent block, in fact, it was the first case steel side block I ever remember seeing.”

He states that the old method of oiling with the grease cup “was not considered practical” (R. 179).

Mr. James Brazel, another practical logger with thirty years experience, testified to early practical conditions as follows (R. 185):

“I started in the logging game with a job of greasing the skids and blocks and worked at all the different kinds of jobs in the logging camps up to superintendent of a camp and have owned a part interest in different camps; have been foreman and superintendent of camps in an executive capacity, for the last 15 years, and during that time have logged fifteen to twenty million feet per year.

“The first logging blocks we had were constructed of boiler plate made in the camp by the blacksmith, consisting of two shells with straps on the sides forming the ears, a cross head, pin and sheave, oiled with a squirt can through a hole drilled angularly through the straps to the pin; in 1902 or 1903 the Bouse block came into use, which consisted of two sides and a pin, with the pin drilled lengthwise and a plug in which we used compound; the compound or grease was forced in by screwing down a plug under the same principle of pressure found in grease cups on a modern automobile; the grease cup block was attended by men who looked after them in the woods, who were supposed to go around and screw the plugs down every so often, according to the amount of work they were doing; if the blocks were

under heavy pressure, the plugs were screwed down a good deal oftener than on a light draft; sometimes the men would forget to screw down the plugs and we burned up the blocks; we had more or less trouble with all that kind of grease cup blocks; when the block stopped we generally took it down and got another block to hang in its place until we got it fixed; until the block was replaced the crew that was working around the engine was practically doing nothing."

The Bouse block referred to by the witness is one of the "prior use" defenses relied on by defendant-appellee and is also shown in Bouse Patent "Defendant's Exhibit T-T" (R. 57-61, Vol. II).

Referring to the patented Gilchrist block in issue witness continues (R. 186):

"I first heard of the self-oiling block in about 1909; Mr. Gilchrist showed me a model of his self-oiling block; I couldn't say exactly the time, but I distinctly remember in 1911, after he got his blocks out, that I bought some of his blocks; it was before he got his patent out, I think about the Fourth of July in 1909 that I saw his model and we were talking about it; *we are now using the self-oiling type of blocks of the Gilchrist type and do not use any other; a man couldn't sell me any other type of block now; the other type of block has gone out of date.*"

SIX WEEKS WITHOUT REPLENISHING OIL.

Continuing this witness says:

* * * "the advantage of the self-oiling block over the grease cup or former types of block is, that when we move a setting we fill the block and

don't bother again until we take it down; it is in there for that setting; the Gilchrist blocks will hold oil for a long time in operation; the first block I put up was a Gilchrist block and we hauled somewhere in the neighborhood of about fifteen hundred thousand feet of logs through that block and it was up for six weeks; in taking it down we took it apart to see how much oil there was in it and it was about one-third full; during that six weeks the block was in continuous work every day; I figure that the self-oiling blocks hold sufficient oil for any one setting and I never figure on oiling the blocks on one setting; of course, it might be possible, a man would have to oil the blocks more than once in a setting if he had a great amount of timber, but I never had that much timber." (*Italics ours.*)

HIGH SPEED CONDITIONS.

On this subject Mr. Brazel says (R. 192-193):

"I judge that the haul-back line could be put back in the woods at the rate of a mile a minute if a man wanted to run the engine that fast; the main line that hauls the load could probably haul logs at a thousand feet in a minute and a half, if they didn't hang up; that would be about as high speed as practical.

"I don't know who pioneered the sky-line mode of logging in the Pacific Northwest; it came about gradually; we first started in to use it by moving the donkeys up on a hill, yarding up hill instead of down hill; I remember seeing the models and cuts of the sky-line system in a catalogue; the idea was carried from one man to another; I changed from the old style to the sky-line and high-lead system and didn't consult with anybody particularly; knew that the thing was in operation and went to the

Mason County Logging Company in the Black Hills to see it in operation; had seen illustrations in catalogues, but can't say whether I got my idea from that or somebody else told me about it; I had heard about this high-lead system and how it worked, talked to people that had been actually engaged in it. * * * Prior to the introduction of the high-lead system we used blocks weighing from 30 to 1000 pounds; the thousand pound block was the Tommy Moore; we would hang these big blocks up about 30 or 40 feet, long before the high-lead system was introduced, never used any of the large type of self-oiling blocks before putting in the high-lead system; when I changed to the high-lead system of logging, I changed to the self-oiling style of block; prior to that time I was using the old style of blocks as yarding blocks and haul-back blocks. The high-lead system had been used more or less for years before I adopted it; I have a man in my camp to look after the high-lead blocks when I can keep him; but they are not always available, sometimes I borrowed a man; it cost me \$50 to get the man to go up and change one block; we don't inspect these blocks every few days, we never inspect the self-oiling blocks unless we want to change them; it has been my experience that the self-oiling blocks have run under continual work for six weeks without oiling."

In contrast with this testimonial to the Gilchrist invention and as showing the previous existing *want* for it, the witness says (R. 188):

"We always had more or loss trouble with the oiling systems of blocks until we got the self-oiling blocks; *before the self-oiling block came there was always a demand for a better system of oiling and a great many men studied on it and got out different rigs, but the com-*

pound system seemed, for five or six years, to be the only system we could get that would come anywhere near giving us any satisfaction at all.

“Have used the Mallory type of self-oiling block and it is the same block as the Gilchrist block, so far as I could see, outside of a few minor changes.” (*Italics ours.*)

Mr. H. J. Owens, a logger of 22 years' experience, testifies to his first experience with horses and then the adoption of the donkey engine, and continuing says (R. 193-194):

“* * * have been manager of logging camps for the last 20 years; logged for myself a long time as an independent logger, then went with the Owen Logging Company, which is putting out about two million feet of logs per month; have been manager of that company for the past 16 years.

“In 1904 we used the Gilchrist logging block (Gilchrist 1904 patent not in suit), which was then oiled with an oil can through a little hole drilled in the side of the shells intersecting with the pin; the last block we used was the grease cup block made by Mr. Gilchrist, and the next type we used was the Gilchrist self-oiling block, which I first bought in March, 1910; he gave me a block at that time to try out; he had then made application for his patent; since 1910 I have used the Gilchrist self-oiling blocks; I think we have a Bouse block in the camp and one Mallory self-oiling block of the same type as the Gilchrist block; *we use nothing else but self-oiling blocks in our camp now*; I know from talking with other loggers in Washington that *they are all adopting self-oiling blocks*; the outstanding features of the Gilchrist type of block are the long bear-

ing pin or hub, the self-oiling device and the hinged top; the long bearing gives less pressure on the pin and the brass bushings by distributing the pressure over greater area." (italics ours.)

This witness on cross-examination illustrates the old saying that "necessity is the mother of invention" where he says (R. 194-195):

"There is always a demand for something better if we can get it, and progress is being made in all methods of work—of logging and in equipment of all kinds; a large portion of this advancement is due to the requests of the loggers in the woods; improvements in logging devices, I believe, have come as a result of the requests of the loggers."

To the same effect of the "want" and of its "fulfillment" is the testimony of Ralph V. Pierce, who, now 60 years of age, has followed the logging business all his life, from working for wages in camp to running and owning them. He says (R. 200):

* * * "the first I ever heard of the self-oiling type of block was in 1912, which was the Gilchrist block, and from that time to this, all the blocks which I have used have been the self-oiling Gilchrist type; *I would buy no other type of block because the other blocks give too much trouble* and you don't have to watch the self-oiling blocks so much; my experience has been that you can leave the self-oiling blocks and know that they will be running without depending upon some human agency to oil them or turn down the grease cups; the first self-oiling block I bought was a trip-line block and my instructions were to hang it up and let it alone for three weeks; I did so and after continuous

operations for three weeks I examined it and it had oil in it; have done high-lead work and owned three high lead blocks; in my judgment the high-lead system of logging has come to stay; I wouldn't think of logging at all any more in the old style way on the ground; not only in rough ground, but in soft ground, the high-lead and sky-line systems of logging are particularly adapted." (Italics ours.)

ALL ADMIT THE GILCHRIST PATENTED BLOCK HAS SUPPLANTED THE PRIOR ART BLOCK SIMPLY BY REASON OF INTRINSIC MERIT.

Mr. B. A. Wheaton, another practical logger and operator, in referring to the patented self-oiling blocks having displaced the other types of blocks, says (R. 202-203):

* * * "the grease cup type of block is not very successful; the grease cup elbows are hard to keep on, as rough as you use moving blocks; when setting the rigging to move a donkey, you have to have some way to get your moving block out. and you generally take it out with a haul-back block so that the moving block is packed through the snow, mud, brush, or whatever happens to be in the way, without reference to what shape it is in; have used the self-oiling block in suit, and it is a far superior block to the grease cup block in that it takes less attention, is more efficient and stays lubricated better; any block with a recessed hub stays clean on the bearing better than a straight sheave block and the more dirt you keep out of the bearing the less wear on the pin.

"Am familiar with the logging equipment used in the western part of Lewis County,

Washington, and Pacific County and part of Grays Harbor County, where I worked moving donkeys and *in these camps it is the fact that the self-oiling type of block is almost universally displacing the old grease cup type of block*; there are some grease cup blocks, but the new blocks are all self-oiling blocks.” (Italics ours.)

With the history of the Gilchrist invention in mind and the manifest “want” that it filled, the rule asserted by this Court in *Morton v. Llewellyn*, 164 Fed. 693, 697 is particularly apt. In that case the Court said:

“Apart from the presumption of novelty that always attends the grant of a patent, the law is that where it is shown that a patented device has gone into general use, and has superseded prior devices having the same purpose, it is sufficient evidence of invention in a doubtful case. *The Barbed Wire Patent*, 143 U. S. 275, 292, 12 Sup. Ct. 443, 36 L. Ed. 154; *Keystone Manufacturing Company v. Adams*, 151 U. S. 139, 143, 14 Sup. Ct. 295, 38 L. Ed. 103; *Irwin v. Hasselman*, 97 Fed. 964, 38 C. C. A. 587; *Wilkins Shoe Button Co v. Webb* (C. C.) 89 Fed. 982; *National Hollow B. B. Co. v. Interchangeable B. B. Co.*, 106 Fed. 893, 707, 45 C. C. A. 544.”

Under this rule of law, which is the governing law of this Circuit, if the Court finds that invention is doubtful, then the admitted commercial success of the device is “*sufficient evidence of invention*”.

While we insist that the evidence herein, disclosing the problems which Gilchrist met and overcame in his production of a practical block side, shows in-

vention, yet even the defendant must admit that they have at best presented only a "doubtful case".

The Supreme Court again in *Keystone Mfg. Co. v. Adams*, 151 U. S. 139, 144, said:

"But when, in a class of machines so widely used as those in question, it is made to appear that at last, after repeated and futile attempts, a machine has been contrived which accomplishes the result desired, and when the Patent Office has granted a patent to the successful inventor, the court should not be ready to adopt a narrow or astute construction, fatal to the grant."

The Court of Appeals for the Second Circuit, in *Rajah Auto Supply Co. v. Emil Grossman Co.*, 188 Fed. 74, said:

"The invention is, of course, a narrow one, but it belongs to that large class where the Courts have sustained improvements over the prior art, which produce a new and beneficial result that materially advances the art to which they belong. When a defendant persists in using such an improvement in preference to prior devices which he insists are equally efficacious, he tacitly concedes its superiority. It is difficult to reconcile his persistent use, even though it involves him in an infringement suit, with the contention that other devices which he is free to use, are equally good."

DEFENDANT ADMITS SUPERIORITY OF PATENTED BLOCK.

We have the testimony of Mr. Mallory, president of the defendant-appellee corporation, paying

the tribute of high praise to the patented blocks in suit. Thus on cross-examination (R. 235-237):

“Q. Now, with reference to the utility of this reservoir type of block, you are willing to admit that that type of block is a commercial success?

“A. Yes.

“Q. And you are willing to admit that for high-lead purposes the oil-reservoir block has displaced the grease-cup block?

“A. Oil-reservoir block has been displaced—is more practical for high-lead purposes than the grease-cup block or oil-cup block.

“Q. And for high-lead purposes you are willing to admit, has displaced the grease-cup block?

A. But could be made with either forged or cast steel sides shown here.

“Q. Answer the question. You are willing to admit the type of block, with reservoir in the side here, has displaced the grease cup block and other types of block, with reference to the piling function, for high-lead work?

“A. We never used the blocks for high lead——

“Q. Answer the question, yes or no.

“A. Couldn't be any displacement because not used before.

“Q. Then there isn't any other type of block used for high-lead work?

“A. No.

“Q. Except——

“A. The oil reservoir block.

“Q. (continued)—The oil reservoir block?

“A. Correct.

“Q. And you are also willing to admit that the high-lead system of logging is an advanced step in the logging industry?

“A. Yes, sir.

“Q. And that it has come to stay?

“A. Yes, sir.

“Q. And makes logging more economical?

“A. Yes, sir. * * *

“Q. And no other form of block is used in that system of logging except the type of block in suit here?

“A. With oil reservoir side.”

COURT AND COUNSEL CONCUR.

In all of this counsel for defendant-appellee concurs (R. 238):

“MR. MCCARTHY. We are willing to admit the commercial success,”

and the Court so finds. The Court is also impressed with this testimony (R. 238):

“THE COURT. I don’t understand there is any question about the utility. Used substantially exclusively for high-lead work.”

The Court so finds in its opinion (R. 26) where it says in finding adverse to the patent:

“In reaching this conclusion, I am not unmindful of the presumption of the validity of the patent arising from its issue, or that the auto-lubricating block manufactured by plaintiff has proven its superior utility in the logging business.”

With this mass of “fact testimony” and with the witnesses, counsel and the Court recognizing the existence of a “want” and its final “fulfillment” by the patented product of plaintiff-appellant, its unblushing appropriation by defendant-appellee calls for a close inquiry into the reasons for the lower Court’s adverse findings.

This brings us to a consideration of the defenses and the so-called prior art.

PRIOR ART.

Some of the patents relied on by the defendant extend back as far as 1852, so it may be said that the 34 or 35 patents offered by way of anticipation partially disclose some 70 years of development in the art involved herein, and yet when the defendant came to build his construction he followed the patentee, Gilchrist, rather than the prior art.

Although this invention is a very simple one nevertheless the defendant has introduced in evidence thirty-four patents, including three British patents, to show that there was no invention involved in the Gilchrist patents in suit. For good measure there are added twenty-three publications, mostly advertisements in the "Timberman" a lumbermen's journal published in Portland, Oregon, illustrating in most general fashion various types of blocks offered on the market between the years 1906 and 1912. Then, of course, there is much oral testimony as to the physical structures referred to in these advertisements, but this Court has frequently expressed itself on the fallibility of oral testimony and human memory when it comes to anticipating a meritorious patent.

As said by your Honors in *Diamond Patent Co. v. S. E. Carr Co.*, 217 Fed. 400 (C. C. A. 9th Cir.):

“Not only is the burden of proof to make good this defense upon the party setting it up, but it has been held that ‘every reasonable doubt should be resolved against him’. And in *Tilghman v. Proctor*, 102 U. S. 707, 26 L. Ed. 279, it was held that the prior use must be something more than an incidental or casual one. In *Gayler v. Wilder*, 10 How. 477, 13 L. Ed. 504, it was held that the prior use must be so far understood and practiced or persisted in as to become an established fact, accessible to the public and contributing definitely to the sum of knowledge. Cases applying these rules are *Acme Flexible Clasp Co. v. Cary Mfg. Co.* (C. C.), 96 Fed. 344, *Anthracite Separator Co. v. Pollock* (C. C.), 175 Fed. 108, *Ramsay v. Lynn* (C. C.), 187 Fed. 218, and *Ajax Metal Co. v. Brady Brass Co.* (C. C.), 155 Fed. 409. Under the rule established by these decisions we are required to view with caution and careful scrutiny evidence which is introduced to show a prior use that destroys the pecuniary value of a patent, which has met with commercial success and has been of value to the community.”

In speaking of the evidence required to sustain this defense the Circuit Court of Appeals for the Eighth Circuit in *Mast, Foos & Co. v. Dempster Mill Mfg. Co.*, 82 Fed. 332, says:

“It is always open to suspicion. It ought to be sufficient to establish such a use beyond a reasonable doubt.”

ADVERTISEMENTS.

It is manifest that there is nothing in the written description of any of the old advertisements relied on by defendant even remotely suggesting the Gilchrist or the defendant's construction, and, of

course, a mere illustration in an advertisement that does not at least illustrate the invention, is wholly incompetent.

“Any printing, writing, or illustration relied upon as part of the prior art must be such as to make disclosure, not to an inventor, but to the ordinary individual, skilled as a workman in the field involved. The documents relied upon must teach the art; must be such that the world has knowledge of the art; must be such that qualified persons, without the exercise of inventive genius, may produce the device from the disclosures.”

Vacuum Cleaner Co. v. Thompson Mfg. Co.,
258 Fed. 239, at p. 240;

U. S. Metallic Packing Co. v. Hewitt Co.,
236 Fed. 739, at p. 743.

See, also:

Automatic Weighing Mach. Co. v. Pneumatic
Scale Corp., 166 Fed. 288.

As your Honors said in *Diamond Patent Co. v. S. E. Carr Co.*, 217 Fed. 400, 402 (quoting *Coffin v. Ogden*, 18 Wall. 120; 21 L. Ed. 821):

“ ‘The invention or discovery, relied upon as a defense, must have been complete, and capable of producing the results sought to be accomplished, and this must be shown by the defendant. The burden of proof rests upon him, and every reasonable doubt should be resolved against him.’ ”

See, also, *Topliff v. Topliff*, 145 U. S. 156.

In *American G. Co. v. Leads (C. C.)*, 87 Fed. 873, 876, Judge Shipman said in substance that:

“A Court is not called upon to struggle to decipher an anticipation in the unfinished work and surmises of earlier students on the same subject, and I am of the opinion that a court is not justified in finding anticipation in an old and discarded device, the meaning of which is obscure and puzzles experts.”

The premise on which His Honor Judge Bean based his opinion of lack of invention, or lack of patentable combination, in the Gilchrist combination finds expression in the opinion as follows (R. 24):

“Under the proof the ultimate question for determination as far as complainant’s patent 977,613 is concerned is whether the element of a pulley side cast in one piece and provided with an interior oil chamber is sufficient, in view of the prior art, to constitute invention and give validity to the patent. All other elements of the claims in question are old in the art, and in the Gilchrist pulley they do not perform any new function or have any new mode of operation, or produce any new result, and therefore the combination of them in one device is not invention.”

We have already referred to your Honor’s decision in *Willard v. Union Tool Co.* on the alleged defense of aggregation.

**DISTINCTION BETWEEN CLAIMS FOR A “MANUFACTURE” OR
“COMPOSITION OF MATTER” AND FOR A “MACHINE”.**

The fault with the learned Judge’s assumption is his failure to appreciate the rule of law underlying a “combination claim”. Of course, the claims in

issue are *combination* claims. If the Court was right in its view that you could only support a patentable combination by showing that there must be at least one *entirely new* element added to the combination, it would practically destroy a great majority of meritorious combination patents which in the past have been upheld by the Courts as valid. If you had to have some one *entirely new* element in a combination in order to give validity to the combination, the patent would really be a patent *on this element alone* and would destroy the distinction now existing between a “machine” and a “manufacture”, or a “machine” and a “composition of matter”.

When we say the Gilchrist claims are “combination” claims we really mean they are claims for a *machine*, for obviously machines, as we understand them, are necessarily made up of a combination of a number of co-acting parts.

It was to offset such error as his Honor Judge Bean early fell into in connection with this case, that is believing that if the element of an “oil chamber” in connection with the block sides was old and all the other elements of the pulley being old, therefore, the patent was void, that led the Courts early to announce the true theory of combination claims to be: that in a combination claim it is presumed that all of the elements are old and that the novelty, if any, resides in the combination and the co-action of the various elements to produce a new or improved result. Once this elemental rule is appreciated that in a combination claim it is presumed

that all the elements are old, we are in a fair way able to grasp the *combinative idea* of the invention and to measure the results of the combination by what the *entire combination* produces over what anything else in the prior art produced, and not try to examine the invention microscopically. In other words, one must first have the proper perspective of the invention measured by the pre-existing *want* and the *degree of accomplishment*.

COMBINATION PATENTS.

It is an elementary rule that in combination claims the invention, if any, lies in the combination, and not in the novelty of any individual element.

Imhaeuser v. Buerk, 101 U. S. 660;

Griswold v. Harker, 62 Fed. 389.

To the same effect is the case of Gormully & J. Mfg. Co. v. Stanley Cycle Mfg. Co. et al., 90 Fed. 279, 280:

“Of course the claim can not be defeated by showing that each of its elements, separately considered, was old. The defendants must prove that the combination was old. If they fail in this, they fail irretrievably.”

One of the best expressions of the Supreme Court on the subject of combination patents is found in Leeds & Catlin Co. v. Victor Talking Machine Co., 213 U. S. 301, 53 L. Ed. 805, where it is said:

“A combination is a composition of elements, some of which may be old and others new, or all

old or all new. It is, however, the combination that is the invention, and is as much a unit in contemplation of law as a single or noncomposite instrument. Whoever uses it without permission is an infringer of it."

As said by the Circuit Court of Appeals for the Sixth District, in *Yesbera v. Hardesty Co.*, 166 Fed. 120, 125:

"The point to be emphasized is that the law looks not at the elements or factors of an invented combination as a subject for a patent, but only to the combination itself as a unit, distinct from its parts * * *"

This Court in *Stebler v. Riverside Heights Orange Growers' Ass'n*, 205 Fed. 735, at 738, said:

"True, we may pick out one similarity in one of these devices, and one in another, and still one in another, and, by combining them all, anticipate the inventive idea expressed in the Strain patent, but the combination constituting the invention is not found in any one of them."

As said by Judge Coxe in *Johnson v. Forty-second Street, M. & St. N. Ave. R. Co.*, 33 Fed. 499, 501:

"Of course, the accusation that the separate elements of the combination were old is of no moment. It would be as irrational to charge an author who has produced a sentence of surpassing power and beauty with plagiarism, because the words which he employs have long been found in the lexicon, as to overthrow a patent for a new and useful combination upon the ground that its separate elements are old."

The British rule is similar, as seen by the decision of the Court of Appeals in the case of *Minerals Sep-*

aration, Limited, v. The British Ore Concentration Syndicate, Limited, et al.:

“The industrial and scientific problems which face mankind are being attacked all over the world by busy, inventive minds from the most varied points of view. When some lucky inventor has been successful in solving the problem and (whether for the purpose of action or otherwise) the records of past failures or incomplete success are searched, it is common to find that suggestions or adumbrations of each of the various steps by which he has achieved his result are to be found in some one or other of the works of those who have gone before him, and when such records are selected from a mass of antecedent publications and put in an isolated form before a court, there is a danger of their giving rise to a suspicion of a general lack of novelty in the successful invention. But it must be remembered that these alleged prior publications are the product of a selection made with a knowledge of the successful invention, and that probably hundreds of proposals equally promising, but which point in wholly different directions, have been rejected in the search by reason that they do so. It is somewhat as though one were to decry the merit of a prospector who had discovered that sands were auriferous, by showing that after due rejection of most of the non-metallic particles from a handful of sand, the gold may be made to appear visible to the naked eye.”

PATENTS TO MORGAN, LUDFORD AND LABADIE.

The Court in arriving at invalidity in *Gilchrist* apparently disregarded all of the thirty odd patents set up in the answer by defendant and offered

in evidence, except the patents to Morgan, Ludford and Labadie.

It is further apparent that the lower Court rightly disregarded all testimony offered by defendant bearing on so-called "prior use", and based its opinion on the question of whether or not the prior art disclosed in three of the thirty-four patents mentioned deprived the plaintiff's patent of the quality of invention.

It ought not to take 34 patents to prove such a simple invention as the Gilchrist block admittedly is, invalid. The citation of such a large number of patents is a compliment to Mr. Gilchrist's genius, if genius you may call it.

As was said by the Circuit Court of Appeals for the First District in *Forsyth v. Garlock*, 142 Fed. 461, 463:

"The citation of a large number of patents as anticipation, tends to strengthen rather than weaken the patent sued upon, by showing that the trade had long and persistently been seeking in vain what the complainants finally accomplished.

"Forty-odd reference patents were not needed to prove that Dean was not a pioneer in the telephonic art, that he did not originate the granular-carbon type of transmitter, and that he was not the first to provide a means for preventing the packing of the granules * * *. The novelty of none of the claims is gainsaid by any single prior patent or structure; but collectively the references establish that all of the elements, broadly considered, which Dean used in making up his combination, were old and were com-

monly used in transmitter construction * * *, but the concept of such a unitary structure was not obviously taught nor foreshadowed by anything in the prior art."

International Tel. Co. v. Kellogg Switchboard Co., 171 Fed. 651 (C. C. A.).

BEST REFERENCE.

Defendant-appellee's expert who, aside from admitting (R. 123) that he has "had no practical experience with the use of logging blocks, except possibly a few times when I have been about logging camps; have never designed any logging blocks; have never taken out any patents nor made any drawings of logging blocks," nevertheless says "as a single patent the best reference meeting claim one is the Morgan British Patent No. 712-1893". Of course, the witness' reference to the claim was wholly improper, but he no doubt intends to consider the Morgan patent as the "one best reference". The Court seems to have accepted the dictum of Mr. Reynolds with regard to Morgan, in saying (R. 25):

* * * "Indeed, the Morgan patent reads substantially letter perfect with claim 1 of complainant's patent. It is true the oil reservoir in the Morgan pulley is formed by a plate revited on the side and not cast as an integral part of it as in complainant's device. It, however, is for the same purpose, operates and functions in the same way and produces the same result by retaining oil and lubricating the bearing pin as in complainant's patent, and it was not invention for complainant to make the side in

one piece, thus combining the separate parts of the Morgan patent since there is no substantial change in function, operation or result."

If the making of Gilchrist's oil chamber integral with his block sides, as distinguished from the riveted-on oil cup of Morgan, is to be made an issue in the case, still the present case goes much further in showing the inventive combination by Gilchrist over Morgan or anything else in the prior art, than was the case in *Krementz v. Cottle*, 148 U. S. 557; 37 L. Ed. 558 (known as the "Collar-Button Case"):

"It is not easy to draw a line that separates the ordinary skill of a mechanic, versed in his art, from the exercise of patentable invention, and the difficulty is specially great in the mechanic arts, where the successive steps in improvements are numerous, and where the changes and modifications are introduced by practical mechanics. In the present instance, however, we find a new and useful article, with obvious advantages over previous structures of the kind.

"The view of the Court below, that *Krementz's* step in the art was one obvious to any skilled mechanic, is negatived by the conduct of *Cottle*, the president of the defendant company. He was himself a patentee under letters granted April 16, 1878, for an improvement in the construction of collar and sleeve buttons, and put in evidence in this case. In his specification he speaks of the disadvantages of what he calls 'the common practice to make the head, back and post of collar and sleeve buttons separate, and to unite them by solder'. His improvement was to form a button of two pieces, the post and base forming one piece, and then soldering to the post the head of the button as the other piece. Yet, skilled as he was, and with his at-

tention specially turned to the subject, he failed to see, what Krementz afterwards saw, that a button might be made of one continuous sheet of metal, wholly dispensing with solder, of an improved shape, of increased strength, and requiring less material.

“It was also made to appear that the advantages of the new button were at once recognized by the trade and by the public, and that very large quantities have been sold.”

In the light of the testimony this Court would be justified in taking the Morgan patent alone “the one best reference” and disregard all the rest of the so-called “prior art”. If Morgan does not anticipate, then none of the patents anticipate.

Waterbury v. Aston, 183 F. 120, (C. C. A. 2nd Cir.).

As said by your Honors in *Los Alamitos Sugar Co. v. Carroll, supra*:

“We do not think it necessary to refer specifically to the large number of patents set up as anticipatory. The one apparently most relied upon is that issued to Chisholm, which was for ‘certain new and useful improvements in the mode of dumping railroad cars’.”

In disposing of Chisholm and with it the rest of the patents, your Honors said:

“It is not sufficient to constitute anticipation that the devices relied upon might by a process of modification, reorganization or combination with each other be made to accomplish the function performed by the device of the patent sued on.”

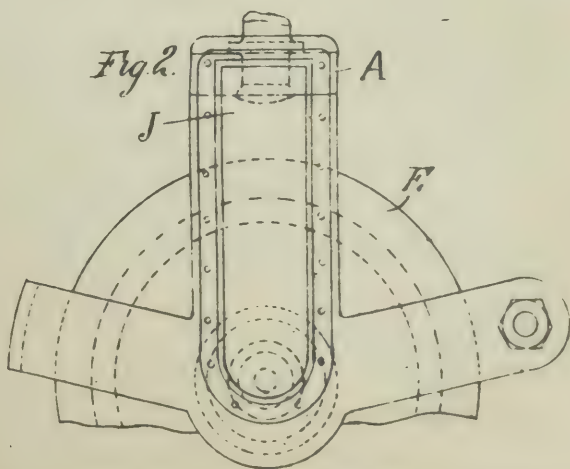
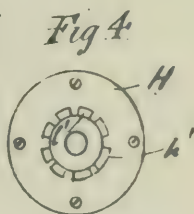
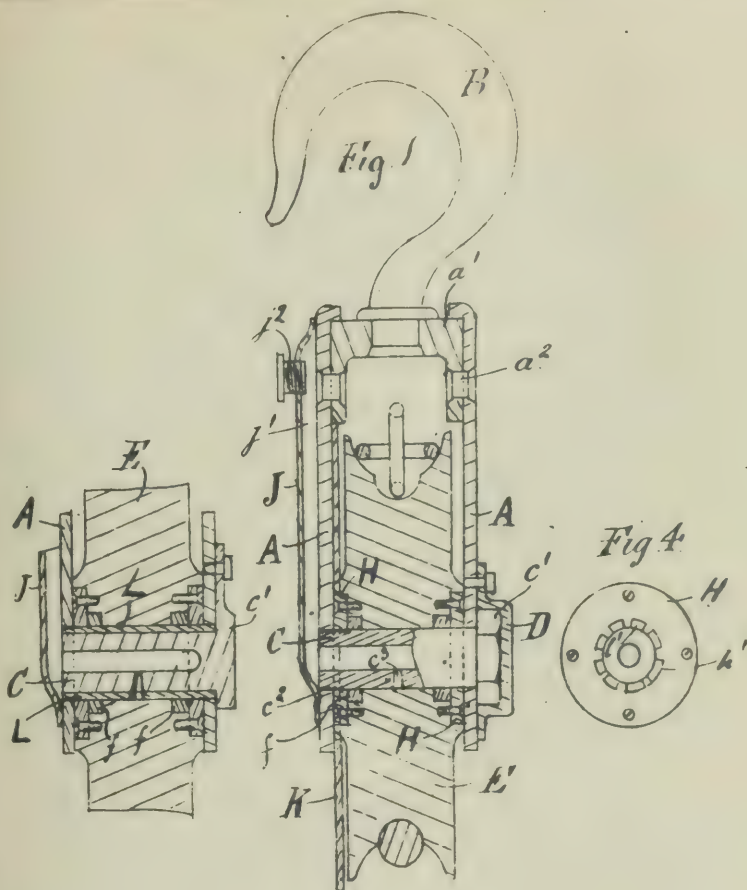
MORGAN BRITISH PATENT.

The Morgan British patent appears in the record (Vol. II. R. 154-157). It comprises two parallel side plates marked "A-A" in the drawing, in which a pin or bolt "C" is fixed forming an axle on which the pulley or sheave "E" turns. It is noted that this axial bolt "C" is cylindrical from end to end and that the check plates or sides "A-A" bear directly against the *hub of the pulley*. Thus it will be seen that any strains on the pulley tending at all to warp or twist the check plates or sides "A-A" would have the effect of binding the sheave or wheel "E" so that it would no longer function as a pulley.

On the outside of the pulley is an *exposed oil cup* consisting of a sheet metal plate "J" *riveted* on, as shown in Fig. 2, and from this oil cup "J" projects outwardly as a *further obstruction* a cap "j2", which closes a hole through which the oil cup may be filled.

The sole description in the patent of this oiling arrangement is the following, beginning line 22, page 2:

"A vertical space J1 extending from below the hollow of pin C to top of block on one side frame A is covered up with a plate J in such a manner as to form an oil cup for containing the lubricant for the pin C, and the said lubricant is charged through the opening J2 which has a removable cap or cover. A suitable hole C3 is formed through the hollow pin C to permit of the oil getting to the outer circumference of said pin C and so lubricating the bearing of the sheave E."



This plate “J” of Morgan is just what the patentee says it is: An “oil cup”.

The Morgan patent, like so many British patents cited in past cases considered by this Court, is suggestive of a “want” and *prophetic* of a possible means of fulfillment, but has fallen far short of fulfillment, Morgan differs from Gilchrist considerably more than in the one feature that the oil cup of Morgan is riveted on the outside and, therefore, likely to be knocked off, and at the same time weakening the structure; whilst in Gilchrist the walls of the oil reservoir are *integral* and, therefore, *reinforcing* the Gilchrist block.

As compared with Gilchrist (or Mallory)we find that Morgan *lacks*:

(1) Annular recesses in the adjacent faces of the block sides;

(2) A bearing pin with reduced ends fixed to the sides and shouldered, so that the shoulders engage the sides of the block to prevent the same from binding upon the sheave;

(3) Hub bosses on the sheave fitting closely and antifric tionally in the recesses in the sides;

(4) A long bearing with dust-protecting means;

(5) Morgan is a narrow sheave block;

(6) Morgan has no protection against dirt and dust;

(7) The more one studies the working conditions under which Gilchrist (and Mallory) operates, a clearer appreciation is there had of the necessity of the Gilchrist-Mallory combination;

(8) Neither has Morgan any means for readily opening up the sides to allow a cable to be looped over the pulley wheel as in Gilchrist or Mallory;

(9) It is apparent from a mere reading of the Morgan patent that it is wholly unadapted for logging purposes, not by reason of its size, but by inherent defects in design and principle. This is abundantly testified to by the practical men who were called to express an opinion upon it.

It recalls the case of *Cimotti v. American*, 115 Fed. 498 (same case 198 U. S. 408):

“For nearly 20 years it remained nothing but an ambiguous description of incomprehensible drawings. It emerged from oblivion solely to meet the exigencies of this litigation. * * * The inquiry is pertinent, why was it that this machine was permitted to remain unused? Since the success of the Sutton apparatus (the device of the patent in suit) every effort has been made by infringers to evade it by introducing specious changes of form, and yet, if we are to accept the contention of the appellant, there is an operative machine in existence doing the work as well as the Sutton machine and free to anyone who desires to use it. * * * Is not the presumption almost conclusive that it was not used because it was not usable.”

MORGAN UTTERLY IMPRACTICAL.

Thus on cross-examination, Patent Solicitor Reynolds, defendant's expert (R. 103) testified concerning Morgan:

“Q. Is that suitable to modern logging? Would that last in the woods today? A flimsy structure of that kind?

“A. I don’t wish to try to qualify as an expert in logging matters and I think I had better not pass on that question.”

Of course, such an answer is worse than an out and out admission of impracticability and this implied admission was only accentuated and made worse by the very next statement of the witness (R. 103):

“I can make a block of the type of the Morgan block which would be successful in the woods.”

In other words, something was left for invention.

“The presumption of invention is not overcome by the fact that an expert is able to build up the patented device by selecting parts taken from the prior art.”

Kryptok Co. v. Stead Lens Co., 207 Fed. 95.

“I cannot adopt the opinions of defendant’s experts. And for a mechanic to say that he can base an opinion on the art as it existed when he was a boy, and not have that opinion affected by the art as it now exists, and which is far in advance of the old art, is to say that he has a mind capable of forgetting and ignoring all that is modern and really practical and must be impressed upon him, and only remembering that which is old and impracticable and of which he has no practical knowledge whatever.”

Underwood Typewriter Co. v. Elliott-Fisher Co., 165 Fed. 927.

“The Zimmer publication must be given effect as an anticipation only to the extent that it actually gave to the public information of a process of filtration. It is not competent to

read into such a publication information which it does not give, or by expert opinion explain an otherwise uninforming statement by evidence of some apparatus or article not itself competent as an anticipation. *Badische Anilin & Soda Fabrik v. Kalle & Co.*, 104 Fed. 802, 44. C. C. A. 201."

Loew Filter Co. et al. v. German-American Filter Co., 164 Fed. 855, 860, C. C. A. 6th Cir.

This is what practical men say of Morgan.

Mr. Wm. Tyler (R. 154-5):

"I never saw a block like the Morgan block shown as Defendant's Exhibit 'BB', and never heard of that kind of a rig; it is not practicable construction for a logging block, because it isn't built for a logging block to start with, the hook would break off the first time you started to use it and the pin is too small; the oiling device would be torn off the first time you tried to put it out in the woods; these big high-lead blocks weigh 1200 to 1400 pounds and we drag them around through the woods on the ground, over stumps and boulders, and all that sort of thing. A side riveted on a 1400-pound block would not hold tight very long; you would never get it hung anywhere, I think. When these blocks are hung up high in the tree and there is a strain put on them, they swing away from the tree and when the strain lets up they jam back against the tree; when a 1400-pound block with a side riveted on, as in the Morgan block, is swung away from the tree, and swung back against the side, it would beat the oiling device right off, carry it right off there."

Mr. H. F. Weatherby (R. 183):

"Referring to the Morgan block, as shown by Defendant's Exhibit 'BB', I would say that

the block was not practical in measurements and general design; logging blocks in the woods suffer hard service and a block of the Morgan type in the light of the present art as shown by the self-contained chamber, with a chamber that is stuck on the outside to receive knocks and blows, would be impractical in logging camps;

* * *

* * * “a practical oil chamber cannot be constructed on a block side without casting it integral with the side because there is no way of protecting it; no one has ever been able to fasten a reservoir upon the side so that it would be as secure as if cast in the side; I could not do it; whether a side made out of boiler plates with pieces properly secured with bolts or rivets would stand more blows than a casting, depends on the nature of the casting; that is a matter for a metallurgist; a casting properly annealed and heat treated will stand as much of a blow as wrought iron or steel.” * * *

Mr. L. E. Younie, an engineer and designer of blocks, says (R. 210-211):

* * * “the reservoir on the Morgan patent is simply an oil receptacle attached on the outside by means of rivets and it has the effect of weakening the block side to the extent of the amount of material drilled out of the block side to make place for the rivets, which is of considerable moment if you count the number of rivets that are supposed to be used in that side, it takes quite a bit of material away. The Morgan block would not be a practical logging block because the abuse and rough usage to which it would be subjected, as all logging equipment is from time to time, would incapacitate it, make the oil receptacle leak and it would be of no use; it is not necessary to break the side before impairing the use of the chamber

for if it were subjected to a blow sufficient to loosen up the rivets, or turn up the edge of the applied piece slightly, the oil would run out, and you wouldn't have an oil chamber; if there were leakage at the top, air pressure would be admitted, which would materially affect the rapidity with which the oil would flow out of it, which I consider of very great importance in an interior oil chamber."

Continuing Mr. Younie points out that the Morgan block would be much more expensive to manufacture than would a Gilchrist block (R. 211). Besides, as already seen, the Morgan block would be inferior.

Another thing that Mr. Younie pointed out, based on the experience of sixteen years as a designer of the pulley blocks for the Willamette Iron & Steel Works (R. 212-213):

"In the first place the width of the sheave is governed by diameter of the line which is supposed to be used on the sheave. In designing a block a matter of very first consideration is to keep the weight within certain limits; keep the weight as low as possible, and we have material enough to stand the strain, but keep the weight down. That is what we all try to do, because these blocks are manually handled over ground that is very difficult for a man to get over. They have to be carried up mountain sides, up hillsides, over logs, and through underbrush; through gulleys and ravines, where even a man's footing is sometimes—it is difficult for a man to get his footing; difficult for a man to get over; these blocks often have to be carried. So you can see that it is very important—it is import-

ant that we keep down the weight within certain bounds, making the sheave no wider at the rim than just necessary to accommodate certain size rope. You can readily see that the only means left for us to avail ourselves to get a long bearing is to put in the annular recess. We can't build a sheave with a rim four inches wide, because we want a bearing four inches wide. If we want to use a one-inch rope in that block, we would make the rim one and a half, or one and three-quarter inches. Then put in an annular recess. This gives a long bearing; we haven't the big mass of rim and the big mass of block."

The books are full of cases where slight changes in appearance of the patented article brought about radical changes in results. Invention is not to be slighted because the changes are slight.

In the case of *United States Fastener Co. v. Bradley*, 149 Fed. 222, the Court of Appeals for the Second Circuit said:

"This court has repeatedly upheld patents for similar improvements, the test being not the simplicity of the device, but the difficulties overcome and the results accomplished."

Indeed as your Honor said in *Kitchen v. Levison*, 188 Fed. 659:

"It is urged that the improvement which the appellee made on the prior art was simple and obvious. It may be conceded it was simple, but that fact alone does not deprive the invention of patentability. There may be the highest form of invention in some of the simplest improvements on the prior art."

THE RULE OF LAW ABOUT PRIOR PUBLICATIONS.

That the Morgan, Ludford, Labadie and other publications were known for many years without leading to the use of the Gilchrist patented block, where such a block was so much wanted that the public took it at once the instant Gilchrist offered them, is a proof from experience that the publications were not sufficient under the rule of law.

The Telephone Cases, 126 U. S. 1;

Seymour v. Osborne, 78 U. S. 11 Wall. 516 (20-33);

Cohn v. U. S. Corset Co., 93 U. S. 366 (23-907);

Cahill v. Brown, 15 Off. Gaz. 697;

Atlantic Giant Powder Co. v. Parker, 16 Off. Gaz. 495;

Hood v. Boston Car Spring Co., 21 Fed. 67;

Betts v. Menzies, 10 H. L. Cas. 154;

s. c., Goodeve's Pat. Cas. 51;

Neilson v. Betts, L. R. 5, H. L. 15;

s. c., Goodeve's Pat. Cas. 56.

Concerning the Morgan patent, the words of the Supreme Court in Carnegie Steel Company v. Cambria Iron Works, 185 U. S. 421, are apt:

“This defense presents the common instance of a patent which attracted no attention, and was commercially a failure, being set up as an anticipation of a subsequent patent, which has proved a success, because there appears to be in the mechanism described a possibility of its having been, with some alterations, adaptable to the process thereafter discovered.”

And on this subject of prior art no better expression of the rule is found than that laid down by Judge Toulmin in *Western Electric Co. v. Home Tel. Co.*, 85 Fed. 649, 656:

“The force of this ruling, and the similar ruling in *Clough v. Barker*, 106 U. S. 175, 1 Sup. Ct. 188, is made manifest, in its practical application to the rights of parties, by the reflection that all earlier patents set up in defense against a later patent sued upon are but the record evidence of the status the art has reached. The rights under such later patent are subject to what this record evidence actually shows. To change this record, by permitting theoretical modifications of these earlier patents, would be the same, in principle, as to change, by interpolation or modification, any other evidence between the parties.”

The defendant will no doubt contend, as indicated by the excerpt quoted above from the lower Court's opinion, that the interior oil chamber of Gilchrist resulted simply from casting in one piece the oil cup and the block side of the Morgan patent; but this is not true; there was much more which Gilchrist had to do than simply cast an oil cup on the outside of the block side. It was necessary for Gilchrist to design and model an altogether different block side from what the prior art had even suggested. To make the block a practical logging block, there must be no sutures for oil to seep through, and Gilchrist overcame this difficulty by making his block side integral and coring out the oil reservoir; the sides of the oil chamber must function as sides of the block

side to strengthen the block side; the oil chamber must be located so as to enclose or extend down over the end of the pin; the metal of the block side must be distributed so as not to increase the weight and still maintain the strength; the addition of the oil reservoir must be inexpensive; the block side must be so constructed as to stoutly and properly engage the pin; the hub bearings above all things must be made dust-proof; there must be a long bearing with dust-protecting means, that is, involve hub bosses and recessed sides. The sides must be supported against collapse. This meant reduced ends of the bearing with supporting shoulders to take the thrust. The oil feed must be regulated so as to slow as well as to be automatic.

Each of these problems was successfully solved by Gilchrist in his development of the block covered by the claims of his patent.

The Morgan patent lacking so many of the essential details of construction of Gilchrist, as well as of Mallory, shows most conclusively the meritorious character of Gilchrist. As said by the Supreme Court in the Barbed Wire Case, 143 U. S. 282:

“Under such circumstances courts have not been reluctant to sustain a patent to the man who has taken the final step which has turned a failure into success. In the law of patents it is the last step that wins.”

As said by the Supreme Court in *Diamond Rubber Co. v. Consolidated Rubber Co.*, 220 U. S. 435:

“Knowledge after the event is always easy and problems once solved present no difficulties, indeed may be represented as never having had any and expert witnesses may be brought forward to show that the new thing which seemed to have eluded the search of the world was always ready at hand and easy to be seen by a merely skillful attention. But the law has other tests of the invention than subtle conjectures of what might have been seen and yet was not.”

The Morgan patent, like so many British patents is at best prophetic but lacking in teaching practical accomplishment.

THE RULE REGARDING ANTICIPATION BY A FOREIGN PUBLICATION OR FOREIGN PATENTS IS STRICTER THAN IN THE CASE OF ALLEGED ANTICIPATING AMERICAN PATENTS AND IS MORE FAVORABLE TO A COMPLAINANT.

As was said in *Hanifen v. Godlshalk Co.*, 84 Fed. 749:

“It is a well settled and familiar doctrine that an invention patented here is not to be defeated by a prior foreign patent unless its descriptions or drawings contain or exhibit a substantial representation of the patented invention in such full, clear and exact terms as to enable any person skilled in the art or science to which it appertains, without the necessity of making experiments to practice the invention.”

Seymour v. Osborne, 11 Wall. 516;

Cahill v. Brown, 3 Ban. & Ard. 580; Fed. Cas. 2291;

Gaylor v. Wilder, 10 How. 477;

Consolidated Car Heating Co. v. American Electric Corp., 82 Fed. 993, 997; same 25 Fed. 662.

The Circuit Court of Appeals of the Second Circuit, in *Westinghouse Co. v. Great Northern Ry. Co.*, 88 Fed. 26, said:

“The prophetic suggestions in English patents of what can be done, when no one has ever tested by actual and hard experience and under the stress of competition the truth of these suggestions, or the practical difficulties in the way of their accomplishment, or even whether the suggestions are feasible, do not carry conviction of the truth of these frequent and vague statements, and are insufficient to render a patent void for want of invention.”

THE LUDFORD PATENT.

The only other patent that needs to receive any special consideration is the patent to Ludford, No. 844,159, dated February 12th, 1907. This shows an interior oil reservoir, but it so lacks all the other elements and essentials of Gilchrist that it is at best an illustration of a patent showing one element of a combination but not showing the combination. Ludford is a sheave block of very simple construction, employing a narrow pulley devoid of hubs fixed to a small cylindrical axle which turns in a couple of adjustable bushings screwed into the sides of the block.

The fact that the block has an oil receptacle is its nearest approach to Gilchrist. Of course, through the skillfulness of Mr. Reynolds, the patent solicitor expert of defendant-appellee, he finds complete anticipation, but he finds that with practically each of the remaining thirty-four patents, although he admits (R. 104) on cross-examination that Ludford does not show an axial bore in the shaft nor a sheave rotating on a pin.

What has been said of Ludford or Morgan applies with equal or greater force to Labadie and each and all of the paper patents brought forward by the defendant.

**MALLORY'S TESTIMONY SUPPORTS THE THEORY
OF INVENTION.**

In considering whether the invention is the result of invention or mechanical skill, the Court should try to put itself in the position whereby the patent in suit is excluded from consideration. It is easy enough, now that Gilchrist has perfected his pulley-block, for the defendant to say that it was obvious to any skilled mechanic that a combination of the successful elements of other blocks would result in a correspondingly successful new block, but the answer to the defendant is that for years the logging industry had been penalized in less efficiency and high costs, by reason of a lack of that which Gilchrist finally, after long years of experimenting,

provided, to wit, the self-oiling block, with its other essential features going into the patented combination. During all this time the industry and its mechanics, skilled in producing logging equipment, were seeking a solution of that problem. Mallory himself was seeking a solution of that problem, and his evidence on the stand discloses that he is a mechanic of no mean ability, but it did not occur to him, nor did it occur to any other one of the thousands of mechanics who were interested in logging equipment, that the combination of Gilchrist was a practical device until he saw the Gilchrist block in 1910-11 and then recognized its merit and sought an exclusive sales agency.

It has usually been accepted that the seat of inventive ideas is in the imagination. If invention springs from the imagination of one person, it is no less an invention if it springs from the imagination of another. We, however, find in the testimony that the defendant claims (R. 79) that the combination of his block arose from *his* "imagination", and if that were true and had he been the first one to produce the combination from his "imagination", he would have been entitled to a patent. Hence, the defendant is hardly in a position to say in one breath that the idea of the Gilchrist patented combination developed from *his* "imagination", and then, in the next breath, to say that such an idea could not have developed from Gilchrist's imagination.

That the Mallory block emanated from the imagination of Mr. Mallory is to be taken, of course, with a grain of salt (except as an admission of invention), because he already not only knew of the Gilchrist block, but he had been handling them and selling them. This "imagination" testimony, however, is an admission on Mr. Mallory's part that it would require the exercise of thought and study to work out his block and put in two oil reservoirs as against one by Gilchrist. If that was invention, how much more was Gilchrist entitled to invention over the prior art.

IMPROPER SO-CALLED "EXPERT" TESTIMONY OF DEFENDANT.

The usurpation of the functions of the Court by the defendant's expert, Reynolds, points to a possible source of error on the part of the trial Court. In any event the abuse of the privileges of an expert is called to the attention of this Court at this time with the object and hope that the Court may feel called upon to make an announcement as a future guide to practitioners in this circuit.

In the instant case the defendant's expert, Mr. Reynolds, viewing the patents academically as a patent solicitor and without any practical knowledge whatsoever, in the industry to which the invention pertains, took it upon himself to argue the patent claims from the stand and draw his own conclusions of what was invention and what was not invention.

Mr. Reynolds gives his occupation as "Patent Attorney and Patent Expert" (R. 101), but admits (R. 123) that he has had no practical experience with the use of logging blocks, had never designed any logging blocks and had never taken out any patents on logging blocks or made any drawings of logging blocks.

He said (R. 103) when asked why the structure of a prior patent most strongly relied on by defendant-appellee for anticipation was suitable for modern logging, answered:

"I don't wish to try to qualify as an expert in logging matters and I think I had better not pass on that question."

Nevertheless, Mr. Reynolds' testimony, which constitutes the bulk of the defense, proceeds in all confidence not only to find "mechanical equivalency" when, of course, he cannot possibly know what would be an equivalent in this particular instance, but proceeds to give his opinion on infringement and invention, and finally applies the claims of the patent to the so-called prior art, with the sole object and purpose of showing that there was no invention in the Gilchrist patent lacking, of course again, those very qualifications which would be a condition precedent to the establishment of a standard whereby one may say there is invention or there is no invention.

As was held in *Hess-Bright Mfg. Co. et al. v. Standard Roller Bearing Co.*, 177 Fed. 435, citing

McMichael & Wildman Manufacturing Co. v. Ruth et al., 128 Fed. 706; 63 C. C. A. 304:

“The fact that an expert, with a patent before him, might be able to build up the structure covered thereby, by selecting and adapting appliances theretofore known, does not overcome the presumption of invention arising from the granting of the patent, where neither the same combination in its entirety nor the same mode of operation had previously been described or known.”

**THE INTERPRETATION OF A CLAIM IS A QUESTION OF LAW
FOR THE COURT. WALKER, §189.**

Practically all of Reynolds' testimony is taken up in giving his views as to what claims 1, 4 and 5 of the 1910 Gilchrist patent mean. Glaring instances of this are seen on pages 101, 110, 115, 117, 123, 125, 138 and 139. Thus on Pages 101 and 102 Reynolds testifies:

“In comparing Morgan's patent with the terms of *claim 1* of the Gilchrist patent 977,613 I find every element of the claim in the Morgan patent in a similar type of construction, working and functioning in a similar way to secure a similar if not identical result. In fact, the resemblance between the two is unusually near and apt.

“Q. Now, I will ask you, Mr. Reynolds, from your experience in the patent office, what you would say would have been done as to *claim No. 1*, had the Morgan patent been called to the attention of the patent office or the examiner?

"Mr. CARY. We have file wrapper showing just what was done in the patent office.

"The COURT. That would be the best evidence.

"Mr. McCARTHY. The file wrapper doesn't show. You don't claim it shows the Morgan patent cited?

"Mr. CARY. It show what the patent office did, and if the patent office looked over the prior patents and came to the conclusion the Morgan was not an anticipation, it wouldn't cite it and it wasn't cited."

Of course, any expression of opinion by Mr. Reynolds, in the face of the file wrapper which is in evidence, was utterly incompetent.

Alleged irregularities in the patent office in relation to the issuance of an original or reissued patent must not only be pleaded but established by full and satisfactory proof in order to defeat the patent (*Coffield v. Spears & Riddle*, 169 Fed 641).

"Such office proceedings can only be impeached for fraud" (*Coffield v. Spears & Riddle*, 169 Fed. 641; citing *Stimson v. Railroad Co.*, 4 How. 380; 11 L. Ed. 1020. *Battin v. Taggart*, 17 How. 77; 15 L. Ed. 37. *Seymour v. Osborne*, 11 Wall. 516; 20 L. Ed. 33).

* * * "the mere expression of opinion by an expert witness, based solely upon the examination of the file wrapper, that such irregularities may have existed, is wholly insufficient evidence to support any such charge" (*Coffield v. Spears*, *supra*.)

Mr. Reynolds thus testifying in the guise of an expert witness was really acting as an ancillary

counsellor and was arguing the case from the witness stand.

At R. 120 it was shown that he was a retained attorney on behalf of the Washington Iron Works (not a party to this suit), who had been notified of infringement of the Gilchrist patent, and that while testifying then on the stand Reynolds had in his hand a report which was dated April 14th, 1919. Reynolds says:

“I had an investigation made and wrote a report covering the question of infringement, which report was dated April 14, 1919, and it is this report which I now have in my hand. This was done, not for Mr. Mallory, but for a Seattle firm.”

The questionable position of Mr. Reynolds is indicated by this inquiry, directed to him by the Court (R. 147):

“The COURT. As such attorney, are you interested in any litigation or probable litigation involving the Gilchrist patent?”

“A. I have not been spoken to by anybody with reference to any litigation that is contemplated in the matter. I did, as I said before, make a report——

“COURT. I know you said expert.

“A. As an expert, pass upon the question of infringement. Aside from that, that is the only thing that has had any connection with the Gilchrist patent.

“Q. In that connection, who was it requested you to pass upon that question?”

“A. That matter was referred to me by an attorney in Seattle.

“Q. Was not by any direct employment of any company?

“A. No; it was by a practicing attorney in Seattle, for a client of his.”

Of course, the fact that Reynolds was employed by another attorney in an associate capacity merely evaded the question of the Court. Clients do not ask attorneys for opinions as to patent infringements for the mere fun of the thing any more than one is accustomed to have a report on title when in some way the party is not vitally interested in the property in question.

THE PROPER FUNCTIONS OF A PATENT EXPERT.

“Since Letters Patent are contracts, *questions of construction are questions of law* for the judge, not questions of fact for the jury. As it cannot be expected, however, that judges will always possess the requisite knowledge of the meaning of the terms of art or science used in Letters Patent, it often becomes necessary that they should avail themselves of the light furnished by experts relevant to the significance of such words and phrases. Such is especially the case when *electric, magnetic and chemical* patents are involved. Some courts have held that it is proper to disregard patents put in evidence to prove anticipation when they are not explained. *Experts are not required and, in fact, the use of their testimony is discouraged in cases in which the mechanical details are simple and the issue of infringement sharply defined.* The judges are not obliged to follow blindly the testimony of experts. They may disregard it if it appears to them to be unrea-

sonable. While the testimony of experts relevant to the meaning of particular words or phrases in Letters Patent, is to this extent admissible, *such testimony is inadmissible on the question of the construction of the Letters Patent as a whole.*" (Italics ours.)

Walker on Patents, Section 189, page 259.

In Section 498, Walker says:

"Experts in patent cases are mainly experts in *mechanics, chemistry or electricity*; and a man who has *extensive theoretical and practical knowledge of either of those sciences*, is a mechanical, chemical, or electrical expert, as the case may be; and a man may be an expert in any other science, who possesses the same qualifications in it. The opinions of such experts are admissible upon the points of fact to which they are relevant; but in order to have much weight, they must be accompanied by statements of good reasons upon which they are based.

* * *

"And *testimony based on experience* is more weighty than testimony based on the theoretical consideration."

In Section 499, Walker says:

"No expert can know whether a particular thing, done or made by a defendant, is the same as anything covered by a particular patent, until he ascertains what that patent covers. But the *latter question is one of construction for the court*, and not a question of evidence, to be sworn to by an expert, and decided by the jury

* * *

A statement of a witness that *a particular thing does or does not infringe a particular patent*, is inadmissible in evidence, because that statement includes a construction of

the patent, and construction of patents is the duty of courts, and not of experts.”

As a matter of fact, expert testimony in modern patent practice has come, by reason of its manifested abuses in the past, to have a pretty bad name as such. Expert testimony when it is really based *on knowledge and experience*; in other words, the testimony of a practical man, is often valuable and, indeed, indispensable, as Walker says; but to have a patent lawyer take the stand and simply argue the case and present a brief on what the claims in his opinion mean and what they do not mean is a pernicious practice and one that should be checked.

This is particularly harmful in a case of this sort where it is not expected that the trial Judge may be wholly familiar with the intricacies and complexities of patent law and practices. There is no more reason why a patent lawyer should be permitted to go on the stand and give his opinion on the application of the law and the facts in suit than should any other lawyer in any other kind of a case take the stand and argue what the law is, under the cloak of an expert witness.

CONCLUSIONS.

In asking this Court to reverse the decree of the lower Court with respect to the 1910 Gilchrist patent, we do so on the ground that it is manifest Gilchrist did invent something of manifest merit

that filled a long-felt want in one of our great industries. If he made an invention he is entitled to protection. The infringement being servile as well as willful gives practically no occasion for the invocation of a broad interpretation of the doctrine of equivalents. If the patent is valid, as we insist it is, then infringement follows as a matter of course. As far as we know infringement is not denied.

Plaintiff asks for nothing more than a construction of the claims adequate to protect the actual invention in view of the actual advancement made in the art. The rule in such cases is well settled.

“When the patentee has produced a structure which inaugurates a new industry and at once becomes popular, and therefore of great value, the Court should be zealous so to construe the claims as to give validity to what it believes to be a meritorious invention.”

Coxe, J., in *Auto Vacuum Freezer Co. v. Sexton Co.*, 239 Fed. 898, 900, 901.

See also

Topliff v. Topliff, 145 U. S. 156;

Klein v. Russell, 19 Wall. 433;

Columbia Wire Rope Co. v. Kokomo Co., 143, Fed. 116-124;

Keystone v. Adams, 151 U. S. 139.

Finally, we call attention to the case of *Hildreth v. Mastoras*, decided November 7th, 1921, by the Supreme Court, 66 L. Ed. (Advance Opinions 1921-1922, December 1st, 1921, page 50). There Chief

Justice Taft gave great weight in upholding the patent to the shortcomings of the prior act and the hearty reception accorded the patented invention by the public; even although the operativeness of the Dickinson patent in suit had at all times been a serious question. There were various other considerations running in favor of the defendant and still the patent was held valid and infringed.

Speaking of the *practical advance* made by the Dickinson patent, the Court said (page 52):

“By these new devices the art of candy making has been revolutionized. Some kinds of candy, which, if pulled at all, had to be pulled when cold, could not be pulled by hand, because it required more than man strength; but they are now pulled by power machines. The production of candy has greatly increased, and 90 per cent of all the pulled candy made is pulled by machine.”

And, again (page 54):

“The history of the art shows that Dickinson took the important but long-delayed and therefore not obvious step from the pulling of candy by two hands, guided by a human mind and will, to the performance of the same function by machine. The ultimate effect of this step with the mechanical or patentable improvements of his device, was to make candy-pulling more sanitary, to reduce its cost to one-tenth of what it had been before him, and to enlarge the field of the art. He was, therefore, a pioneer.”

Furthermore, in holding that a machine that will accomplish such results ought not to be too nar-

rowly construed in the light of the so-called prior art, the Court said (p. 53):

“The Circuit Court of Appeals held the claim of Dickinson to be limited by a prior patent to Firchau for a candy-working machine, applied for in March, 1893, and issued December 19, 1893. * * * The Firchau device never, so far as appears in the record, made candy experimentally or otherwise. Indeed, no candy was commercially pulled by machine before or after the issuing of the Firchau patent in 1893 until the introduction of the Dickinson principle, nine or ten years later.”

Chief Justice Taft furthermore indicates that too much stress should not be put on any particular word or phrase in a claim even in the face of Patent Office objections and amendments, where the effect would be to deprive an inventor of his just desserts; the Court saying:

“Counsel for the respondent, in seeking to narrow the construction of the broad claim of Dickinson, rely on the circumstance that one of Dickinson’s claims in the Patent Office was canceled on a reference to Firchau. The canceled claim of Dickinson was:

“‘In a candy-pulling machine, in combination, a series of pins or pulling members, and automatically acting means for causing said members to feed the candy to each other and pull the same.’

“The Examiner evidently considered that the word ‘series’ might be held to cover a device with only two pins, as shown in the Firchau patent; though, having in mind the essential elements of the Dickinson patent, it could hardly have borne such a construction. How-

ever that may be, as neither Firchau nor anyone else has shown, with two pins only, the in-and-out movement in pulling candy which is the fundamental element of the Dickinson invention, the cancelation does not seem to us important, or to require a narrowing of Dickinson's claim for the described and indispensable co-operation of three or more pins to produce that movement."

Of course, in the present case there is no question of estoppel by Patent Office actions, because the patent was allowed substantially as drawn; but on the question of efficiency (or *inefficiency*) in the prior art, the two cases run parallel.

We respectfully submit that the decree of the lower Court should be reversed with costs on this appeal.

Respectfully submitted,

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No. 3786

In the United States Circuit
Court of Appeals

FOR THE NINTH CIRCUIT

JOHN E. GILCHRIST,
Appellant.

vs.

F. B. MALLORY COMPANY,
Appellee.

On Patent 977,613
Dated December 6, 1910
for Logging Block

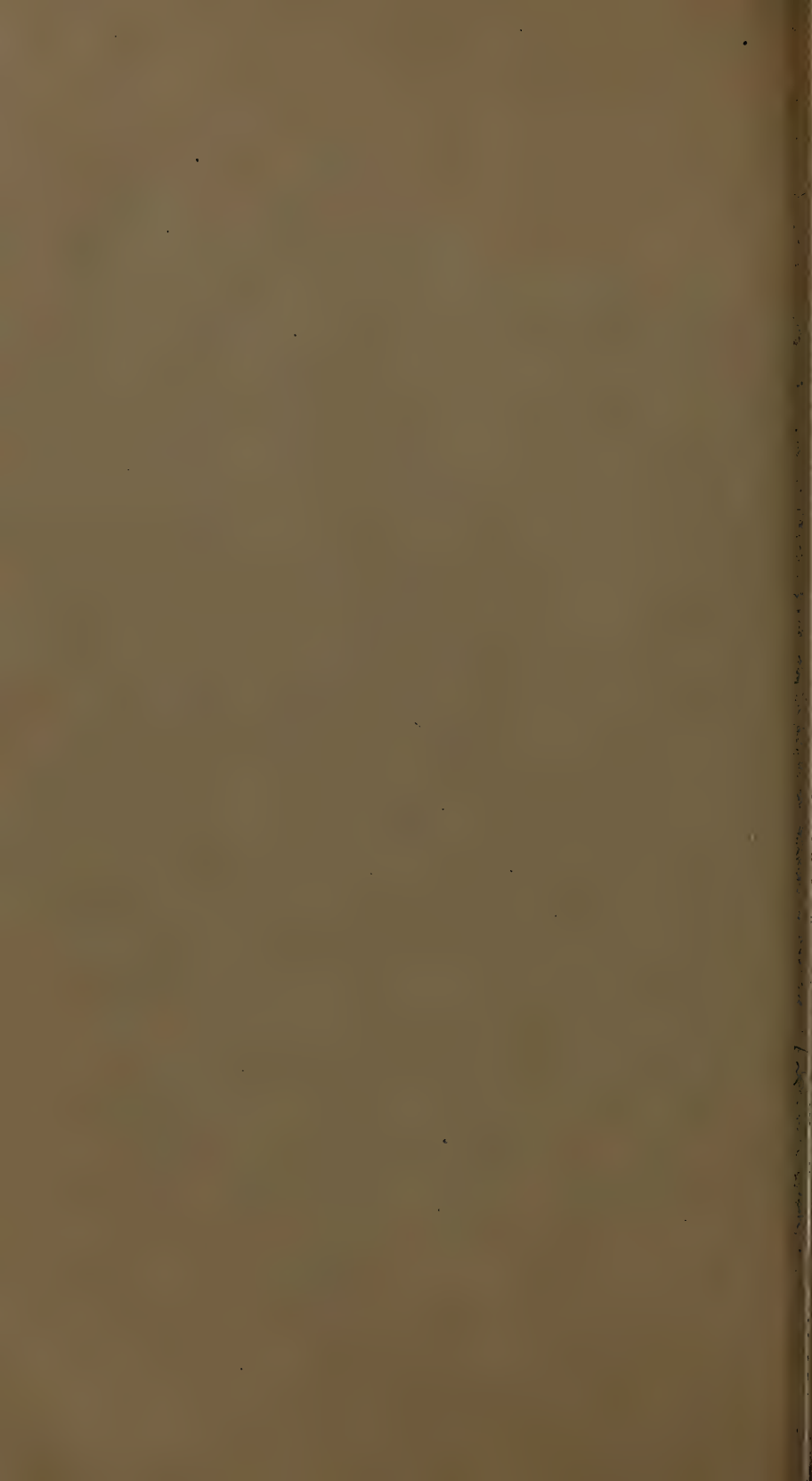
BRIEF FOR APPELLEE

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FILED

FEB 7 - 1922

F. D. MONCKTON,
CLERK



EXPLANATORY NOTE

Realizing that the Court will be familiar with many of the cases and legal propositions which go to make up this brief, I have felt it advisable to classify the cases under appropriate headings and make an index thereto so that the Court may readily turn to the authorities on any given subject. I have also arranged an alphabetical index showing where each of the cases cited or referred to may be found in this brief.

In the use of my own citations I have endeavored to select such quotations from the cases as will in themselves convey a fair statement of the facts upon which the rule of law is based. Where this could not conveniently be arranged I have given a short statement of the facts so that the value of the citation may be more readily determined.

I have also arranged an alphabetical index which will enable the Court to turn at will to the comments which I have made concerning any particular case cited by appellant.

Italics throughout this brief are mine and are used for the purpose of emphasis.

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In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOHN E. GILCHRIST,
Appellant.

vs.

F. B. MALLORY COMPANY,
Appellee.

On Patent 977,613
Dated December 6, 1910
for Logging Block

BRIEF FOR APPELLEE

STATEMENT OF FACTS

This suit was based upon the alleged infringement of United States Letters Patent No. 977,613 issued to John E. Gilchrist December 6, 1910, and United States Letters Patent No. 1,063,528 issued to the same party on June 3, 1913, but as appellant has abandoned his appeal as to Patent No. 1,063,528, this brief will be confined to matters pertaining to said United States Letters Patent No. 977,613.

In the complaint originally filed it was alleged that claims 4 and 5 of this patent had been infringed, but by amendment just prior to trial the complaint included Claim 1.

The defendant set up most of the usual defenses which may be made in a suit of this kind, but a short classification of the defenses as considered in this brief is as follows:

1: Claims 1, 4 and 5 are invalid for lack of invention and want of patentable novelty.

2: Claims 4 and 5 respectively define mere unpatentable aggregations of elements, which defendant does not use and, therefore, does not infringe.

3: Estoppel.

The testimony and exhibits show that between the years 1902 and 1907 there came into general use in the Pacific Northwest, logging blocks having oil reservoirs in the form of elbows, elbow extension reservoirs and grease cup reservoirs. Each of these types of reservoirs communicated with an axial opening in the pin, which axial opening extended through the side wall of the pin. Said pins were terminally mounted in the sides of the blocks. Many of them were long bearing pins provided with shoulders and having ends threaded to engage the sides of the blocks in recessed portions thereof. These blocks were provided with sheaves journaled for rotation upon the pins and the sheaves of many of these blocks were provided with oppositely disposed bosses adapted to fit closely, but

anti-frictionally in the recesses of the sides. Most of the pulley blocks were provided with a top removably connecting the sides, said sides having lateral projections at their upper ends to which the top was adapted to fit and was attached by removable pins passing through the projections and lugs on the top and sides of the blocks.

The defendant's own catalog issued in 1907, and being defendant's Exhibit B, illustrated several of these pulley blocks. In the advertisement of many of these pulley blocks particular stress was laid upon the feature of its being a self-lubricating block, a long bearing block or a dirt proof block. In fact, most of these pulley blocks embodied all of the elements contained in Claims 1, 4 and 5 of the Gilchrist Patent No. 977,613, excepting that the oil reservoir was not integral with the side of the block. (R. 56 to 64; Trans. Mallory's Test., pp. 58 to 84; R. 87 to 89; Trans. Borquist's Test., pp. 130 to 134; R. 89 to 91 and 137; Geary's Test., pp. 137 to 142 and 287; R. 133 to 136; Taylor's Test., pp. 277 to 284; and R. 217; Younie's Test., pp. 482 to 483.)

The blocks made by Columbia Steel Works, also the Exhibits I, L, N and GG, and explained on pages 68 and 69 of the testimony (R. 59 to 63), embody these particular elements and features; and among a multitude of patents the following list will be sufficient for the purposes of this brief:

U. S. Patent	Defendant's Exhibit
520,973	E. M. Tousley, June 5, 1894.....RR
644,729	W. W. Bouse, March 6, 1900.....TT

699,518	E. B. Hammond, May 6, 1902....	UU
760,378	A. N. and C. B. Borquist.....	HH
765,475	J.E.Gilchrist (Pltff.), July 19, '04	WW
779,437	G. Nettle, January 10, 1905.....	YY
786,790	G. W. King et al, April 4, 1906....	3-A
806,562	A. Opsal, Dec. 5, 1905.....	3-B
847,955	J. N. Lindsay, March 19, 1907....	3-F
869,422	W. H. Corbett, Oct. 29, 1907.....	3-G
876,176	B. W. Hammond, January 7, 1908.	3-H
880,805	J. Mattson, March 3, 1908.....	3-I
942,274	E. Martin, Dec. 7, 1909.....	3-K

During the trial of the case it was admitted by complainant's expert that each of the elements found in Claims 1, 4 and 5 of complainant's patent were found in the exhibits and patents of the prior art introduced by defendant, except that it was sought to distinguish the oil reservoir of the Gilchrist block from that shown in the pully blocks and publications of the prior art. (R. 217—pp. 482, 483 of transcript of testimony.) The controversy between witnesses and attorneys as to Patent No. 977,613 finally narrowed down to the single issue as to whether or not Gilchrist had displayed invention in providing the particular oil chamber or reservoir which he used. (R. 90—p. 139 of transcript of testimony.) However, a careful examination of the testimony and the exhibits discloses the fact that complainant's contention concerning the oil reservoir is based upon the complainant's blocks as actually manufactured rather than upon the claims as set forth in his patent.

For the purpose of meeting complainant's contention concerning the Gilchrist oil reservoir the defendant contended that the claims alone should be considered and that the claims themselves were so drawn as to be fully anticipated by earlier patents, among which were the following:

British Patents	Defendant's Exhibit
712 Morgan, Jan. 12, 1893.....	3-O
5,657 J. C. W. Kjelgard, March 13, 1896...	3-P
4,127 T. R. Dyne, Feb. 26, 1901.....	3-Q
U. S. Patent	Defendant's Exhibit
349,691 Butters, Sept. 28, 1886.....	4-C
513,067 Labadie, Jan. 16, 1894.....	QQ
780,280 H. Gilley, Jan. 17, 1906.....	ZZ
844,159 E. Ludford, Feb. 12, 1907.....	3-D

The defendant was the first one to push the skyline system of logging in the Pacific Northwest, and it was in connection with his efforts to establish the skyline system of logging that he developed his own line of large reservoir auto-lubricating blocks, containing a reservoir in each side of the block. His first skyline high lead block with auto-lubricating sides was made in the month of March, 1914, being about two years prior to the time that Gilchrist designed blocks for this purpose. (R. 231—pp. 511, 530 transcript of testimony.)

The design of this block was worked out by Mr. Mallory and Mr. Hirschbuhl during the month of September or October, 1913. (R. 95 to 98—p. 120, transcript of testimony.) Mr. Hirschbuhl, who took charge

of the mechanical part of designing this block, testified that it was the result of suggestions on his part and Mr. Mallory's part; that Mr. Mallory had requested that a block with oil reservoir sides be made up, and they figured out the design of the block without having any other block before them. Mr. Hirschbuhl further testified that he had no drawings and had never seen the Gilchrist self-oiling block before designing the Mallory block. (R. 79 to 81 and 92—pp. 106, 144, 145, 148, 149, 150 and 151, transcript of testimony.)

Shortly after Mallory put his auto-lubricating skyline high lead blocks upon the market, he heard indirectly that Gilchrist had indicated that they were an infringement of his patent and that he intended to allow Mallory to make enough of these blocks to make it worth while, and then sue him for infringement. Upon hearing this, the defendant immediately had a search made in Washington to determine whether or not his line of blocks was infringing any other line of blocks, and wrote to the complainant herein telling what he had heard and the opinion which he had received from his attorneys at Washington, D. C., and from his attorney in Portland, Oregon. After some correspondence on the subject it was indicated by complainant that the matter would have to rest until such time as he could be in Portland and take the matter up with the defendant. Complainant was thereafter furnished with certain reference patents, and no more was heard from him concerning infringement until just a short time prior to the bringing of this suit. (R. 54 and 65 to 70; Trans. of Test., pp. 73 to 80, 99 to 101 and 120.)

After this correspondence had passed between complainant and defendant, complainant placed upon the open market and displayed in his catalogs, blocks embodying the combination claimed in his patent No. 977,613, without marking thereon the patent date of December 6, 1910, but using only the patent date of his guard patent. (See transcript of testimony, pages 81 to 87, and defendant's Exhibits T. and U.) (R. 70 to 72.)

The defendant has never made a line of blocks in which the hub of the sheave was adapted to fit closely in annular recesses of the sides, and never made any attempt whatever to provide what is known as a dust-proof hub.

The file wrapper and contents of Gilchrist patent No. 977,613 show that this patent was granted just as originally applied for, and do not show that the examiner had considered a single patent of the prior art.

ANALYSIS OF CLAIMS IN ISSUE

For the convenience of the court, each of the claims in issue is hereinafter set forth in full and then analyzed by subdividing the same into the various elements which go to make up the combination of the claim. All of these elements have been numbered so that they may be referred to in the brief by number, and the reference numerals used in the drawings and specifications, which designate the particular elements, have been placed after the respective elements so that the court may readily identify each element in the patent drawings.

CLAIM NO. 1, PATENT NO. 977,613:

A pulley block consisting of sides, one of which is provided with an interior oil chamber having an inlet adjacent the top of the block; a bearing pin terminally mounted in the sides and having an axial opening communicating with the chamber and extended through the side wall of the pin; and a sheave journaled for rotation upon the pin between the sides.

Analysis of Claim No. 1:

Elements:

1. Sides (Ref. Nos. 1 & 2)
2. An interior oil chamber in one of the sides. (Ref. No. 4)
 - (a) An inlet to said chamber adjacent the top of the block. (Ref. No. 5)

3. A bearing pin. (Ref. No. 24)
 - (a) terminally mounted in the sides. (Ref. Nos. 18 & 19)
 - (b) and having an axial opening communicating with the chamber (2), (Ref. No. 27)
 - (c) and extending through the side wall of the pin. (Ref. No. 28)
4. A sheave journaled for rotation upon the pin between the sides. (Ref. No. 20)

CLAIM NO. 4, PATENT NO. 977,613:

A pulley block consisting of parallel sides having annular recesses in their adjacent faces, one of the sides being provided with an interior oil chamber having an inlet adjacent the top of the block; a bearing pin terminally threaded to engage the sides in the recessed portions thereof, the pin having an axial opening communicating with the chamber and extended through the side wall of the pin; a sheave journaled for rotation upon the pin and having oppositely disposed bosses adapted to fit closely but anti-frictionally in the recesses, the pin having shoulders to engage the sides to prevent the same from binding upon the sheave; and a top removably connecting the sides above the sheave.

Analysis of Claim No. 4:

Elements:

1. Parallel sides (Ref. Nos. 1 & 2)
 - (a) having annular recesses in their adjacent faces. (Ref. No. 17)

2. An interior oil chamber, provided in one side.
(Ref. No. 4)
 - (a) having an inlet adjacent to the top of the block.
(Ref. No. 5)
3. A bearing pin.
(Ref. No. 24)
 - (a) terminally threaded to engage the sides in the recessed portions thereof.
(Ref. Nos. 18 & 19)
 - (b) the pin having an axial opening communicating with the chamber.
(Ref. No. 27)
 - (c) and extended through the side wall of the pin.
(Ref. No. 28)
4. A sheave journaled for rotation upon the pin.
(Ref. No. 20)
5. Oppositely disposed bosses upon the sheave adapted to fit closely, but anti-frictionally in the recesses (1a).
(Ref. No. 21)
6. The pin having shoulders to engage the sides (1) to prevent the same from binding upon the sheave.
(Ref. No. 26)
7. A top removably connecting the sides above the sheave.
(Ref. No. 8)

CLAIM NO. 5, PATENT NO. 977,613:

A pulley block consisting of parallel sides, one of which is provided with an interior oil chamber having an inlet adjacent the top of the block; there being a threaded opening in the wall of said side

communicating with the chamber adjacent the bottom thereof, and an oppositely disposed threaded opening in the other of said sides; a bearing pin terminally threaded to engage the threaded openings, the pin having an axial opening communicating with the chamber and extended through the side wall of the pin; a sheave journaled for rotation upon the pin; the sides having lateral projections at their upper ends; a top having spaced lugs between which the projections of the sides are adapted to fit; and removable means for uniting the projections with the lugs.

Analysis of Claim No. 5:

Elements:

1. Parallel sides. (Ref. Nos. 1 & 2)
2. An interior oil chamber in one of said sides. (Ref. No. 4)
 - (a) having an inlet adjacent to the top of the block. (Ref. No. 5)
3. A threaded opening in the wall of said side. (Ref. No. 18)
 - (a) communicating with the chamber (4) adjacent the bottom thereof.
4. An oppositely disposed threaded opening in the other of said sides. (Ref. No. 19)
5. A bearing pin. (Ref. No. 24)
 - (a) terminally threaded (25) to engage the threaded openings. Ref. Nos. 18 & 19)
 - (b) the pin having an axial opening communicating with the chamber. (Ref. No. 27)

- (c) and extended through the side wall of the pin. (Ref. No. 20)
- 6. A sheave journaled for rotation upon the pin. (Ref. No. 20)
- 7. Lateral projections upon the sides at their upper ends. (Ref. No. 6)
- 8. A top. (Ref. No. 8).
 - (a) having spaced lugs between which the projections (7) are adapted to fit. (Ref. No. 7)
- 9. Removable means for uniting the projections with the lugs. (Ref. No. 22)

By examination of the foregoing claims as analyzed, it will be observed that some of the elements are subdivided into subordinate or qualifying elements which limit and restrict the elements so qualified, and thereby prevent the claims from the broad construction or interpretation to which they would be entitled if not so limited.

For example, the element "2" of Claim 1, Patent No. 977,613, does not cover broadly an oil chamber in one of the sides, but restricts it to a chamber having an inlet adjacent to the top of the block. Likewise, with element "3" of said claim, a bearing pin in its broad sense was confessedly old, and each of the qualifying elements "3-a", "3-b" and "3-c" must be considered as an essential element of the combination, the elimination of which would avoid an infringement of the combination claim.

By comparison of the claims as so analyzed and by the process of elimination of like elements in the various claims, one can readily see what there may be in one claim to distinguish it from the others. By a like comparison and application of the claims as analyzed to the devices which are found in the prior art, one can also readily ascertain whether or not there is anything in the claims which is not found in the prior art, and determine whether or not any of the elements function in any different manner than what is shown by the prior art, or whether the combinations disclose any new mode of operation.

For example, in comparing Claims 1 and 4 of Patent No. 977,613, we find Claim 4 to be almost a repetition of Claim 1, disclosing the same mode of operation, and distinguished or differentiated from Claim 1 only by further restricting the same and narrowing the construction thereof by adding the qualifying elements "1-a", "5", "6", and "7". Upon further consideration of these elements it will appear that element "6" of Claim 4 defines only an additional and wholly unnecessary specific limitation of element "3" of the claim. Element "7" of Claim 4 is only a positive enumeration (with a limitation) of means of suspension—"a top"—which, being essential to every form of "pulley block" is no less included in Claim 1 by necessary implication than it is by positive language in Claim 4.

It follows then that the only material differentiation between the subject matter defined in Claim 1 and that defined in Claim 4 is set forth in element "1-a", to-wit: "Annular recesses" in the adjacent faces

of the block sides, together with the complimentary element "5", to-wit: "Oppositely disposed bosses upon the sheave adapted to fit closely, but anti-frictionally in the recesses '1-a'".

Having then arrived at the conclusion that the only question left to be decided in Claim 4 after disposition of Claim 1 is whether the addition of the annular recesses in the faces of adjacent block sides and oppositely disposed bosses upon the sheave to fit closely but anti-frictionally in the recesses, is patentable independently of Claim 1. We can then look to the prior art for the determination of this question, and also to defendant's device to determine whether or not he infringes the same.

By a similar method of comparison and elimination the court may with exactitude, directness and certainty, arrive at the very issues to be decided.

On pages 111 and 112 of this brief will be found seven additional claims, lettered from "A" to "G," which have been drawn for the purpose of showing what a narrow construction would necessarily have to be placed upon the claims, even if no consideration whatever were to be given to the prior state of the art.

The claims so drawn are considered in connection with the subject "Dedication to and Rights of the Public," beginning at page 108 of this brief. It is felt that by becoming familiar with the claims in issue as analyzed, by realizing the numerous other claims that could have been drawn, and keeping in mind the prior state of the art, there will be less trouble in making the application of the law as set forth in the cases cited.

DEFENDANT'S THEORY OF THE CASE.

Before examining in detail the cases and authorities, and before taking up the general argument of the case, it is deemed advisable to give a brief statement of the defendant's theory of the case.

While the patent sued upon indicates that the patentee claims to be the inventor of a new and useful machine, termed a "pulley block," it is the contention of the defendant, that in view of the prior art that complainant's patent does not describe a machine having any new mode of operation.

The court will take judicial knowledge of the fact that the primary elements of the simple machine termed a "pulley block" in their essential combinations are old in the prior art.

It has been verified by the exhibits and by the testimony of both complainants and defendants' witnesses that each of the elements of the various combinations can be found in the prior art performing the same function as it performs in the device described in complainant's patent. For example, complainant does not contend that there is any different law of operation or mode of operation in the lubricating device as disclosed in Patent No. 977,613, from that which is found in the British patent to Morgan, defendant's Exhibit BB; but it is contended by complainant that the oil reservoir provided in a one-piece casting which forms one of the sides is a distinctive and better reservoir than the one disclosed in the Morgan patent.

If it should be conceded that complainant is correct in this assumption, the Gilchrist device would merely be an improvement of the Morgan device and would not constitute a new or distinctive machine by reason of the fact that there would be no change in the mode of operation.

For example, it is perfectly apparent upon the face of Claim 1 that the patentee is seeking to protect the given means of lubricating a pulley block. There is nothing else in this claim concerning which the court will not take judicial knowledge of the fact that it was old in the prior art. It is apparent that the primary purpose of the oil reservoir in both the Gilchrist device and the Morgan device is to contain a given quantity of lubricant. It is also apparent that the oil is fed from this reservoir, through the axial opening of the pin and extension of this opening to the side of the pin, upon the bearing surfaces by the law of gravity, and capillary attraction from rotation of the sheave, exactly the same in each of these devices. This being true, the Gilchrist device could not be a new machine, but merely an improved machine or pulley block; and it remains only to determine whether or not, in view of the prior art, any improvement is disclosed, and if disclosed, whether or not that improvement amounts to invention.

It is the contention of defendant that a different rule is applicable to determine what is invention when it involves the improvement of a machine from that which determines invention in a new machine or in an article of manufacture. For example, a new ma-

chine may be the result of invention where it embodies a new mode of operation. An article of manufacture may be the subject of invention when it discloses a superiority in the article itself or in the cheapness of its manufacture which is the result of something more than ordinary mechanical skill. But an improvement in a machine by the improvement of one or more of its elements without changing its mode of operation cannot amount to invention, if the particular element as so improved can be found in the prior art, or if the elements added to the combination can be found in the prior art performing the same function; and if the change or modification in any one of the elements of the combination discloses nothing more than what would amount to mechanical skill on the part of a mechanic skilled in the art and having before him all similar devices and like elements of the prior art, the same would not amount to invention.

It makes no difference how much superior the improved machine may be to any found in the prior art, nor what may have been its commercial success. If it does not pass the test of invention as above outlined it cannot furnish the basis for a valid patent. It is the contention of defendant that neither of the patents sued upon passes the test for invention, but even if it should be considered that the claims described patentable combinations the narrow construction which would need to be placed upon them would relieve the defendant from the charge of infringement.

In substantiation of the foregoing theory, there will now be given a few legal references before taking up in detail the points and authorities and the general argument of the case.

It should be continually borne in mind that the mere fact that a device is new, or that there is a new arrangement of elements, does not necessarily mean that there is invention, and that it is only the *inventor* who is referred to in various statutes and cases as being entitled to protection. United States patents are granted under power conferred by the Constitution upon Congress, "to promote the progress of science and the useful arts," and Congress has no power to grant a patent to any one but an inventor.

U. S. Constitution, Art. 1, Sec. 8, Clause 8.

By act of Congress, a patent may be obtained under the conditions named in the act, by "any person who has *invented or discovered* any *new* and useful art, machine, manufacture or composition of matter, or any new and useful improvement thereof,"

R. S. Sec. 4886.

The act further prescribes, as will be subsequently emphasized, that every patentee shall file a description of his invention or discovery, "and he shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery."

R. S. Sec. 4888.

The word "discovery" does not have, either in the Constitution or the statute, its broadest signification. In those documents it means nothing less than invention.

Walker on Patents, Fifth Ed., Sec. 2.

That the subject matter of every patent must be the creation of nothing less than invention appears from the statute itself, and is recognized by all the courts.

Thompson v. Boissilier, 114 U. S. 11;

Pierce v. Mulford, 102 U. S. 112.

In the case of *Atlantic Works v. Brady*, 107 U. S. 192, Justice Bradley sets forth some of the distinctions between invention and natural advancement and mechanical skill, in the following forceful and instructive language:

"The process of development in manufactures creates a constant demand for new appliances, which the skill of ordinary head workmen and engineers is generally adequate to devise, and which, indeed, are the natural and proper outgrowth of such development. Each step forward prepares the way for the next, and each is usually taken by spontaneous trials and attempts in a hundred different places. To grant to a single party a monopoly of every slight advance made, except where the exercise of invention somewhat above ordinary mechanical or engineering skill is distinctly shown, is unjust in its principle and injurious in its consequences. The design of the patent

laws is to reward those who make some substantial discovery or invention which adds to our knowledge and makes a step in advance in the useful arts. Such inventors are worthy of all favor. It is never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufacture. Such an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention. It creates a class of speculative schemers who make it their business to watch the advancing wave of improvement, and gather its foam in the form of patented monopolies, which enable them to lay a heavy tax upon the industry of the country without contributing anything to the real advancement of the arts. It embarrasses the honest pursuit of business with fears and apprehensions of concealed liens and unknown liabilities to lawsuits and vexatious accountings for profits made in good faith."

A statement to like effect was made by Judge Phillips in the case of *Tiemann v. Kratz*, 85 Fed. 439.

Indeed, nearly a hundred cases involving that rule have now been adjudicated.

Walker on Patents, Fifth Edition, Page 27.
Cases collected in note 18 on said page.

"Industry in exploring the discoveries and acquiring the ideas of others; wise judgment in selecting

and combining them; mechanical skill in applying them to practical results; none of these are creation. None of these enter into the inventive art."

Robinson on Patents, Vol. 1, page 117.

Walker on Patents (Fifth Edition) lays down the following rules supporting them by authorities:

Sec. 30. "It is not invention to so enlarge and strengthen a machine that it will operate on larger materials than before." (Compare, plaintiffs' contention of added strength gained by making his oil reservoir in one piece).

Sec. 31. "It is not invention to change the size or degree of a thing, or of any feature or function of a machine or manufacture."

Sec. 32. "Aggregation is not invention."

It is often repeated that patents are entitled to liberal consideration, but always liberality is due only to actual inventors. "*Such inventors*," as Justice Bradley states above, "are worthy of all favor." It is in every instance "*the right of the inventor*" (Tarrill v. Railway Co., 1 Wall. 491); "*the just claims of the inventor*" (Rubber Co. v. Goodyear, 9 Wall, 788); "*actual invention*" (McClain v. Artmayer, 141 U. S. 425); "to secure to inventors a monopoly of what they have actually invented or discovered" (Topliff v. Topliff, 145 U. S. 171), and not a mere as-

section of right that is entitled to the favor of the courts.

The most which could be said for the Gilchrist device would be that wise judgment had been used in combining elements found in or selected from other devices without in any way changing the function which any of these elements performed, either separately or in other combinations. Under the points and authorities hereinafter given it will be found this would not amount to invention.

There was no task left for Gilchrist to solve. A side with an interior oil chamber in one piece is not what the claims cover and, therefore, cannot be the foundation of the patent. Neither the claims nor the specification refer to this feature as the invention and the Court cannot reconstruct the claims.

The making of a side with an interior oil chamber cast in one piece was old and therefore could not be the subject of invention.

Even if no such side could be found in the prior art, the making in one piece of that which had previously been made in several pieces could not amount to invention.

Claim 1 as drawn is anticipated by the Morgan patent and therefore void.

A new and useful result within the meaning of the patent law is more than the mere bringing together of elements in a new and workable combination.

POINTS AND AUTHORITIES

INVENTION AND NOVELTY ARE QUESTIONS OF FACT.

The question of invention is always a question of fact and not a question of law.

Pappenhusen v. Fakke, 5 Blatch. 49;

Streeter v. Davis, 16 F. R. 564;

Keene v. New Idea Spreader Co., 231 F. R. 701.

But these questions of fact are to be determined by means of the rules of law.

Walker on Patents (Fifth Ed.), p. 59.

Questions of novelty are also questions of fact.

Battin v. Taggert, 17 How. 74;

Farrill v. Railroad Co., 1 Wall. 491.

THE CLAIMS MEASURE THE INVENTION

“As patents are procured ex parte, the public is not bound by them, but the patentees are. And the latter cannot show that their invention is broader than the terms of their claim; or if broader, they must be held to have surrendered the surplus to the public.”

Keystone Bridge Co. v. Iron Co., 95 U. S. 278.

See also:

Continental Paper Bag Co. v. Easton P. B. Co.,
210 U. S. 405.

As has been previously noted by Sec. 4888 of the Revised Statutes, the claims of a patent are made an indispensable part of every application for patent.

The Court is doubtless familiar with the law on this subject, but it is deemed in order to present the following propositions of law: All claims are required to be definite "so that the public may know what they are prohibited from doing during the existence of the patent, and what they are to have at the end of the term as a consideration for the grant."

Brooks v. Fiske, 15 How. 212, 215.

"It seems to us that nothing can be more just and fair, both to the patentee and to the public, than that the former should understand and correctly describe, just what he has invented and for what he claims a patent."

Merrell v. Yeomans, 94 U. S. 573.

The invention patented is the invention set forth in the claims and that only.

Riley v. Morse, 15 How. 62;

Grant v. Walter, 148 U. S. 554;

McClain v. Ortmyer, 141 U. S. 424;

Yale Lock Co. v. Greenleaf, 117 U. S. 555.

CLAIMS CANNOT BE ENLARGED BY SPECIFICATIONS.

"(1) Strictly speaking, infringement of a patent is an erroneous phrase; what is infringed is a claim,

which is the definition of invention, and it is the claim which is the cause of action.

“One may appropriate many of the ideas or concepts suggested by the specification and drawing, but it is the claim that measures both the patented invention and the infringement thereof. This rule obtains whether the patent be spoken of as great or small, primary or secondary.”

(Citing Walker on Patents, 5th Ed., 186.)

“(2) A patentee may describe something that he does not claim, or claim that which he does not describe; his grant of privilege is construed to cover only that which is both described and claimed, no matter how broad the claim-language may be. * * * Description may limit a claim, which must always be read in the light of the prior art; but it can never expand it. So that a patent (i. e., a claim) can never be given a construction broader than its terms in order to cover something which might have been claimed but was not.

“(3) The drawings may help out an ambiguous description, but never can they supply the entire absence of any description of the feature of the invention.”

Fulton Co. v. Powers Regulator Co., 263 Fed. 578, page 580.

The case of Fulton Co. v. Powers Regulator Co., *supra*, pertains to a water heating apparatus in which one of the elements was a thermo-sensitive bulb con-

taining a trap. The functional difference between the plaintiff's apparatus as described and defendant's No. 8 was the prolongation of the tube, pipe or conduit inside the bulb with the crooked end at the bottom thereof. The language of the claim is "A conduit opening into said vessel." The specifications nowhere state whether the tube is long or short. Conduits had long been used in connection with similar apparatus and it would be necessary to construe the plaintiff's apparatus as embodying a long and crooked conduit in order to avoid anticipation from the prior art. In view of this situation the Court found that there was no infringement for the reason that while the claims could be read so as to include defendant's device, they could not so be read without also reading in the devices of the prior art.

"There is no suggestion in either of these claims that the ends of the bolster rest upon springs in the side trusses, although they are so described in the specification and exhibited in the drawings. It is suggested, however, that this feature may be read into the claims for the purpose of sustaining the patent. While this may be done with a view of showing the connection in which a device is used, and proving that it is an operative device, we know of no principle of law which would authorize us to read into a claim an element which is not present, for the purpose of making out a case of novelty or infringement. The difficulty is that, if we once began to include elements not mentioned in the claim, in order to limit such claim, and

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"Where a patentee, after describing a machine, claims as his invention a certain combination of elements, or certain device, or part of the machine, this is an implied declaration, as conclusive, so far as the patent is concerned, as if it were expressed, that the specific combination or thing claimed is the only part which the patentee regards as new. So far as the patent is concerned, the remaining parts are old or common and public."

The Corn Planter Patent, 23 Wall. 181.

The claiming of a specific device and an omission to claim other devices apparent on the face of the description is the dedication of the latter to the public, unless saved by re-issue of the patent.

Miller v. Brass Co., 104 U. S. 350.

EACH CLAIM IS AN INDEPENDENT PATENT.

Each claim is an independent patent.

U. S. Nickel Co. v. Calif. Electrical Works,
25 Fed. 475.

Considered as and setting forth an independent invention.

Leeds & Catlin v. Victor Talking Machine Co.,
213 U. S. 301.

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avoid a defense of anticipation, we would never know where to stop."

McCarthy *et al* v. LeHigh Valley R. R. Co.,
160 U. S. 110;

Railroad Co. v. Mellon, 104 U. S. 112, 118;

5th Ed. Walker on Patents, p. 235, Sec. 181.

EACH ELEMENT CONSIDERED ESSENTIAL

Inasmuch as the claims measure the invention, each element is a necessary part of the same and where a combination has been patented, and in the patent is described a claim as consisting of certain elements, each of such elements is thereby made an essential feature of the combination, whether necessary to the performance of its function or not, and cannot be repudiated by the patentee.

Royer v. Schultz Belting Co., 28 Fed. 850;

Fay v. Cordesman, 109 U. S. 408.

If, therefore, a patentee inserts an unessential feature in his claim, he cannot afterwards deny its materiality.

LeFever v. Remington, 13 Fed. 86.

Wright v. Yuengling, 155 U. S. 47, 52.

Where a claim ascribes a function to any of the things which it specifies, that ascription is a limitation of that claim.

Masseth v. Larkin, 111 Fed. 409.

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And each claim is judged by itself and stands or falls as though it were the only one included in the patent.

Robinson on Patents, Sec. 972, Vol. 3, p. 166.

Russell v. Place, 94 U. S. 606.

COURTS SHOULD PROTECT PUBLIC AGAINST PATENT MONOPOLY.

“(2) The present hearing illustrates even more fully than the former hearing the necessity of requiring a patentee to reasonably limit his claims, so that they shall embody and specify elements essential to his actual improvement in the art. The right of a patentee to exclude others from the use of old and familiar mechanical combinations and structures must be carefully restricted. The duty rests upon the courts to guard the rights of the public against that form of unjust monopoly which may result from sustaining highly abstract claims. The language of the Supreme Court in *Carlton v. Bokee*, 17 Wall. 463, 471, 21 L. Ed., 517, should always be in mind:

“‘We think it proper to reiterate our disapprobation of these ingenious attempts to expand a simple invention of a distinct device into an all-embracing claim, calculated by its wide generalizations and ambiguous language to discourage further invention in the same department of industry. * * *’

“An attempt to save such claims by a beneficent interpretation is not only contrary to well-established

patent law, but a practical mistake. Patent claims are advisedly made by skilled solicitors, and if they choose to claim abstractions or high generalizations they must stand by them.

“As was said in *American Bell Tel. Co. v. National Tel. Mfg. Co.* (C. C.), 109 Fed. 1043:

“‘The patent statutes require the patentee himself to claim and define his invention, so that the public may know its rights, and so that there shall not be imposed upon the courts the burden of constructing upon a hearing new claims from the interpretations that experts may place upon language of the most sweeping and general character.’”

“(3) What is prior art is a matter that cannot be determined arbitrarily, nor merely by a restriction of the claim to a special use.

“If the thing is old, and is applied to perform its old functions, it remains in the prior art, and cannot be made novel, in the sense of the patent law, merely because used in new surroundings that do not affect its character or mode of operation.”

Robinson v. Tubular Woven Fabric Co., 248 Fed. 526, 541, 542.

PRESUMPTION OF VALIDITY.

“The Patent Office being charged by law with the duty and being given the power to pass upon all applications for patents, the courts always *prima facie*

presume that its action in granting a patent is correct. But this presumption has not been treated by the courts as conclusive, and the reports are full of cases in which the presumption was overcome and the patents held invalid. It is by no means certain that this has not been the result in a majority of cases which have reached the Supreme Court. The reason must be that in many essential respects the hearing in the Patent Office is to a degree *ex parte*, and there must be a natural and altogether proper disposition there to give the applicant the benefit of all serious doubts."

Wm. B. Scaife & Sons Co. v. Falls City Woolen Mills Co., 194 Fed. 139, 145.

PRESUMPTION DESTROYED BY FILE WRAPPERS.

The file wrappers and contents of the Gilchrist patents, in view of the prior art, destroyed ~~the~~ the *prima facie* presumption of invention.

The fact that the British patent of Morgan, defendant's Exhibit 3-0, was not cited or referred to in the file wrapper of Gilchrist patent No. 977,613, overcomes and destroys any *prima facie* presumption which might otherwise be indulged in to establish novelty or invention.

The language of the Court as hereafter quoted applies with emphasis to this case:

"We do not agree with the contention that the file wrapper discloses the patent to have been granted as

first applied for, without any references, adds any force to the presumption of novelty arising from the grant. On the contrary, we think the force of that presumption is much diminished, if not destroyed, by the lack of any reference by the examiner to, or consideration of, the 'Clark' patents. It does not seem likely that an expert examiner would pass them by, without notice or consideration, if they had been called to his attention. We feel compelled, therefore, to the conclusion that the first and fifth claims of the patent in suit are invalid for want of patentable novelty."

American Soda Fountain Co. v. Sample, 130
Fed. 145, 149.

"It should be noted that it appears from the record that neither Wightman nor the Potter patent was cited to the examiner in the patent office and were overlooked by him. This circumstance affects the presumption in favor of the validity of the patent from its issuance."

Westinghouse Elec. Mfg. Co. v. Toledo P. C. &
L. Ry., 172 Fed. 371, 392.

"Nor is the ordinary presumption to be indulged in favor of the patent, because of the action of the patent office in allowing it; the Urie, Schwartz, and Suter patents, as it appears, not having been referred to, as they have been here."

Elliott & Co. v. Youngstown Car Mfg. Co., 181
Fed. 345, 349.

"In this case some of the most significant patents in the patent office apparently were not cited or referred to in the consideration of the petition for the patent in suit. This circumstance alone goes far to overcome the presumption of validity."

Wm. B. Scaife & Sons Co. v. Falls City Woolen Mills Co., 194 Fed. 139, 145.

THE PRESUMPTION IS A MERE RULE OF EVIDENCE AND CANNOT USURP THE JUDGMENT OF THE COURT.

"The presumption referred to is something defined to mean that the patent itself is *prima facie* evidence of novelty and of invention, but that presumption is probably a mere rule of evidence, which casts the burden of proof upon the alleged infringer. This presumption cannot usurp the province of the court to declare what constitutes novelty. The courts should give due consideration to the action of the patent office, but should not permit that action to control its deliberate judgment when it is manifest that there is no invention."

J. J. Warren Co. v. Rosenblatt, 80 Fed. 540, 543.

"The patent office, however, has generally issued a patent to any one who produced a device not before known, unless it was considered reasonably clear that such device did not involve invention. Therefore, in finding a remedy for the evils above stated, the courts

have held invalid a large percentage of litigated patents."

Boss Mfg. Co. v. Thomas, 182 Fed. 805, 816.

UTILITY AND COMMERCIAL SUCCESS.

"It is shown that large sales have been made of the manure spreaders upon which the patented structure in question has been used, and it is insisted that this fact in connection with the presumption arising from the issue of letters patent, ought to sustain the patent. True, in cases of doubtful validity, commercial success of the patented device is helpful, but such a fact cannot aid patented claims which are, as here, clearly lacking in the necessary quality of invention." (Citing numerous cases.)

Keene et al v. New Idea Spreader Co., 231 Fed. 701, 710.

"The utility of a device and commercial success in exploiting it cannot be used to resolve the doubt as well as to create it, else every useful and successful thing would be patentable."

Republic Rubber Co. v. G. & J. Tire Co., 212 Fed. 170, 172.

"It is true that the Taylor machine seems to be capable of doing more work and at less expense for labor and pouncing material, than the prior devices,

which it appears to have largely supplanted; but this consideration, while persuasive, is by no means decisive, and is only available to turn the scale in case of grave doubt respecting the validity of invention."

National Hat Pouncing Machine Co. v. Heddon et al, 148 U. S. 482.

"It is true the Orum lock seems to have gained an immediate popularity, to have met with large and increasing sales, and to have had the usual effect of successful patents in stimulating the activity of business competitors to produce an equally useful and popular device. Were the question of patentability one of doubt, this might suffice to turn the scale in favor of the patentee, but there are so many other considerations than that of novelty entering into a question of this kind that the popularity of the article becomes an unsafe criterion."

Duer v. Corbin Cabinet Lock Co., 149 U. S. 216. (Near end of decision.)

"It may further be conceded that appellant's carriers are better than the Alvey carriers or any other of the prior art; this, too, is unavailing. It is met by the old rule that mere carrying forward of the original idea, a change in form, an improvement in degree, without substantial change in either means or result, is not invention."

Huebner Toledo Breweries Co. v. Matthew Gravity Carrier Co., 253 Fed. 435.

**SUPERIORITY OF ARTICLE AND COMMERCIAL SUCCESS DO
NOT PROVE INVENTION.**

"It may be true that Helms was the first to use a burnishing tool having a guard, in connection with a finger rest, and that his machine is probably superior to machine devices of like design, but as all of these elements were old and no new function is formed by the combination, it is a case of a mere aggregation which it is well stated is not patentable."

Union Edge Setter Co. v. Keath, 139 U. S. 530.

"This is what we ascertain to be the precise idea embodied in the invention described and claimed in the patent, and which, although we find to be new in the sense that it had not been anticipated by any previous invention, of which it could therefore be declared to be an infringement, yet is not such an improvement as is entitled to be regarded in the sense of the patent laws as an invention.

"In reaching this conclusion we have allowed its due weight to the presumption in favor of the validity of the patent arising from the action of the Patent Office in granting it; and we have not been unmindful of the fact, abundantly proven, and indeed not denied, that the adoption of the present taxpaid stamp, in lieu of that previously in use by the Internal Revenue Bureau, has proven its superior utility in the prevention of frauds upon the revenue. The testimony on

that point of the Commissioner of Internal Revenue from his official reports is quite conclusive.”

Hollister v. Benedict & Burnham Manufacturing Co., 113 U. S. 59, 70.

“(3) Upon careful consideration of the prior art and giving due weight to well established utility of plaintiff’s device and its highly favorable commercial reception, we are unable to find in it room for invention. The most which, to our minds, can be said is that the inventor has, in the exercise of a high degree of mechanical skill, selected and put together the most desirable parts of different devices in the same art, making a new structure, *doubtless better* than any which preceded it, *but in which each part operates in substantially the same way* as it did in the old and effects substantially the same result. This is not invention.” (Citing cases.)

Edwards v. Dayton Mfg. Co., 257 Fed. 980, 983.

See also Huebner Toledo Breweries Co. v. Matthew Gravity Carrier Co., 253 Fed. 435, under preceding heading.

See also following quotations from McClain v. Ortmeyer, 141 U. S. 419:

“The principle announced in Vance v. Campbell, 1 Black 427, that where a patentee declares upon a combination of elements which he asserts constitute the novelty of his invention, he cannot in his proofs abandon a part of such combination and maintain

his claim to the rest, is applicable to a case of this kind where a patentee has claimed more than is necessary to the successful working of his device." (Page 425.)

"Counsel for plaintiff in the case under consideration has argued most earnestly that the only practical test of invention is the effect of the device upon the useful arts—in other words, utility is the sole test of invention, and, inferentially at least, that the utility of a device is conclusively proven by the extent to which it has gone into general use. He cited in this connection certain English cases which go far to support this contention. *These cases, however, must not be construed in such way as to control the language of our statutes, which limits the benefits of patent laws to things which are new as well as usefull.*" (Page 427.)

"If the generality of sales were made the test of patentability, it would result that a person, by securing a patent upon some trifling variation from previous known methods, might by energy in pushing sales, or by superiority in finish, or decorating his goods, drive competitors out of the market and secure a practical monopoly without in fact having made the slightest contribution of value to the useful arts." (Page 428.)

"While this court has held in a number of cases even so late as *Magowan v. N. Y. Belting & Packing Co.*, Ante, 332, decided at the present term, that in a doubtful case, the fact that a patented article has gone into general use is evidence of its utility, it is

not conclusive even of that—much less of its patentable novelty.” (Page 429.)

“But a mere carrying forward or new or more extended application of the original thought, a change only in form, proportions, or degree, the substitution of equivalents, doing substantially the same thing in the same way by substantially the same means with better results, is not such invention as will sustain a patent. *These rules apply alike, whether what preceded was covered by a patent or rested only in public knowledge and use.* In neither case can there ~~be~~^{be} an invasion of such domain and an appropriation of anything found there. In one case everything belongs to the prior patentee, in the other, to the public at large.

The question before us must be considered in the light of these rules. All the particulars claimed by the complainant, if conceded to be his, are within the category of *degree*. Many textile fabrics, especially those of cotton and wool, are constantly improved. Sometimes the improvement is due to the skill of the workmen, and sometimes to the perfection of the machinery employed. The results are higher finish, greater beauty of surface, and increased commercial value. A patent for the better fabric in such cases would, we apprehend, be unprecedented. The patent in the present case rests upon no other or better foundation.” Decree affirmed.

Smith v. Nichols, 21 Wall. 112, 119.

“In short, this is a patent only for superior workmanship, and within all the authorities is invalid. This court has repeatedly stated that all improvement is not invention. If a certain device differs from what precedes it only in superiority of finish, or in greater accuracy of detail, it is but the carrying forward of an old idea, and does not amount to invention. Thus, if it had been customary to make an article of unpolished metal, it does not involve invention to polish it. If a telescope had been made with a certain degree of power, it involves no invention to make one which differs from the other only in its having greater power. If boards had heretofore been planed by hand, a board better planed by machinery would not be patentable, although in all these cases the machinery itself may be patentable.”

Risdon Locomotive Works v. Medart, 158 U. S. 68.

AGGREGATION IS NOT INVENTION.

Walker on Patents, 5th Ed., Sec. 32.

It is the contention of defendant that complainant's patents describe and claim a mere aggregation of old elements, all of which elements are found in the prior art performing the same functions which they perform in the Gilchrist devices.

As questions of invention and novelty are questions of fact to be decided by the Court under fixed rules of law, and, as the law is well settled that mere ag-

gregation is not invention, the question of aggregation also becomes a question of fact to be decided by the Court under fixed rules of law, based upon what may be found in the prior art in the form of actual operative devices or descriptions in previous patents and publications.

There are hereinafter set forth statements and quotations taken from cases heretofore decided, from which it may be seen how some of our ablest patent jurists have applied these rules of law in deciding the questions of fact which they had under consideration.

COMBINED RESULTS MAY BE AGGREGATION.

“It must be conceded that a new combination, if it produces new and useful results, is patentable, though all the constituents of the combination were well known and in common use before the combination was made. But the results must be a product of the combination, and not a mere aggregate of several results each the complete product of one of the combined elements. Combined results are not necessarily a novel result, nor are they an old result obtained in a new and improved manner. Merely bringing old devices into juxtaposition, and there allowing each to work out its own effect without the production of something novel, is not invention.”

Hailes v. Van Wormer, 20 Wall. 353, 368.

In the following case the court had under consideration a patented flume-gate. The evidence as to the prior art showed the use of two forms of gates, both manufactured of galvanized iron. One of the prior gates differed from that of the patent only in the fact that the plate edges which held the slide against the projecting edge of the tube were bent and flattened instead of being inbent and curved so as to present a resilient pressure against the slide. This gate, known as the "Ford gate" was satisfactory on the whole, although inferior to the appellant's gate, and the court stated that had this gate been the only one of the prior art it would have been disposed to say that the appellant's device was patentable, as showing invention and improvement on the prior art.

"Now, what the appellant has done is to take the best features of those two forms of gates in prior use and combine them in one. We agree with the court below that this is not invention.

"Counsel for the appellant, in view of the fact that the Ford gate and the other gates of the prior art were in common use side by side for more than ten years before the date of the appellant's invention, inquires why, if the step taken by the appellant was an obvious one it was not taken by some mechanic during all that long period of time. The answer seems to be that the Ford gate was reasonably satisfactory. According to the testimony, it is still satisfactory. It is displaced by the appellant's gate only in cases where the purchaser desires to secure a bet-

ter made gate, and perhaps a better gate, at a higher price than the Ford gate.”

Campbell v. Mangle (9th Cir.), 194 Fed. 110, 112.

In the case of Self-Sealing Can Co. v. Hacker, 136 Fed. 418, 420, the court had under consideration a patented self-sealing can. It was found that covers similar to those used were described in the Norton patent and that a similar mechanism on the can was found in the Bently patent, but the connecting mechanism was different in the Norton patent and the top was different in the Bently device, in that the same was made of wood and the opening was made of a different shape, but by selecting elements from each of these other patents or devices a combination similar to that in the patent under consideration could be obtained.

At page 420 is found the following language:

“The Norton can top, patented June 21, 1881, is similar in construction to that of defendant. In this patent, however, a wooden top was used.

“The Bently top, however, is the same kind of mechanism as that of plaintiff, but the opening in the can was different and the flange extended upwards instead of downward.

“So that we have in the Bently can top and the Norton can opening the same combination found in the Spencer patent. Merely bringing old devices in juxtaposition, and there allowing each to work out its

own effect, without the production of something novel, is not invention." (Citing *Hailes v. Van Wormer*).

"The effect of this use of old devices in the construction of the McNeal split wood pulley was to strengthen it, and thus add to its durability; but it did not produce a new result or effect."

Dodge Mfg. Co. v. Collins, et al, 106 Fed. 935, 938.

"Each element of the claim in suit was old in this very art, and has been used to perform the same function assigned to it in Johnson's present device. This ruffler introduces no new mode of operation, produces ruffles no better and no faster, and does not afford the user (though it may to the manufacturer) any advantages over others. The novelty consisted in selecting and rearranging old elements to produce a machine new in form, but old in function, and therefore an old machine."

"'It is not invention to combine old devices into a new article without producing any new mode of operation.'"

Cheapness of the article was urged.

"But the patent is for improvements in a machine which is a combination of mechanical elements adapted to receive and apply motion to the production of a mechanical result, and the patent would as certainly be infringed by a ruffler of which the parts were forged or cast or machined as by one made of stamp-

ings. The consideration of cheapness therefore lies in the process, and not in the product.”

Griest Mfg. Co. v. Parsons, 125 Fed. 116, 119.

Walker, under the head of Aggregation, refers to *Hailes v. Van Wormer* in the following language:

“In *Hailes v. Van Wormer* the patents passed upon, covered certain self-feeding coal stoves. These stoves were better than any which preceded them, because they contained more good things than were ever before assembled in that kind of heater. All of the things so assembled were old. The superiority of the patented stoves arose from the fact that sundry good features, theretofore scattered through several, were in them gathered into one such article of manufacture. The things so united did not, however, perform any joint function, but each did only what it had formerly done in former stoves. The Supreme Court held the whole to be a mere aggregation of devices, and not to be invention.”

It may be added by way of further explanation of the foregoing case that some of the elements of the claim pertain to the means and manner of controlling the smoke and draft; other elements pertain to the shape of the fire box, grates and magazines; while still others pertain to the use of mica, through which the flames or burning could be observed.

On page 374 of the reported case is found the following apt language concerning the attempt to include the mica or illumination openings as an element of the combination:

"We observe that its first claim was for a combination of the illumination openings, flame-expansion chamber, coal-supply reservoir, fire-pot, descending-flue and draft-flue, substantially in the manner and for the purpose described. In the main this is the same combination as that claimed in the reissued patent we have had under consideration. The only change is the addition of illumination openings. These were a well-known device applied to stoves long before either of the patents were granted. They perform no peculiar office in the new combination. They have no possible relation to it. They do not affect, in the slightest degree, the results of that combination, whatever they may be. It is impossible to regard the mere addition of such openings to a stove containing the improvements described in the reissued patent, as the formation of a new patentable combination. It is not invention."

In the case of *Pickering v. McCullough*, reported in 104 U. S. 310, the court had under consideration whether or not the combination of a forming rib to shape or form the inside of a piece of crucible or pottery in combination with a mould and revolving disk for holding in place and forming the outside of the article, was patentable. The prior art disclosed that one Salvétat had previously described or used a rib for forming the inside of a piece of crucible or pottery in connection with a revolving table or potter's wheel, in connection with which it was necessary to partially present and support the ball or article of

pottery under the action of the rib by the workman using his hands. The rib described as used by Salvetat was so guided as to cause it to approach the axis of the pot where it was necessary to do so in order to prevent injury to the pot.

The prior art also disclosed a mould for manufacturing certain articles of pottery by means of a device which moulded the outside of the article and held it in place under the action of the rib which shaped the interior of the crucible; but in this combination the rib could not be guided towards the center and it was therefore impossible to make a pot or crucible which would be larger in its central portion than at the top thereof, as the rib would destroy and break the top upon removing the same.

On page 317 of the reported case the court uses the following language:

“The alleged invention then consists merely in supplying to the apparatus described by Salvetat a mould for supporting the ball and give shape externally to the crucible. We are clearly of the opinion that this is not patentable. It comes plainly within the rule as stated by Mr. Justice Strong in *Hailes v. Van Wormer*.”

The court then approves the foregoing quotation from *Hailes v. Van Wormer*, and continues with the following language:

“‘The combination, to be patentable,’ said Mr. Justice Hunt, in *Reckendorfer v. Faber* (92 U. S. 347, 357), ‘must produce a different force or effect,

or result, in the combined forces or processes, from that given by their separate parts. There must be a new result produced by their union; if not so, it is only an aggregation of separate elements.'

"In Nimmo's apparatus, it is perfectly clear that all the elements of the combination are old, and that each operates only in the old way. Beyond the separate and well-known results produced by them severally, no one of them contributes to the combined result any new feature; no one of them adds to the combination anything more than its separate independent effect; no one of them gives any additional efficiency to the others, or changes in any way the mode or result of its action. In a patentable combination of old elements, all the constituents must so enter into it as that each qualifies every other; to draw an illustration from another branch of the law, they must be joint tenants of the domain of the invention, seized each of every part, "*per my et per tout*," and not mere tenants in common, with separate interests and estates. It must form either a new machine of a distinct character and function, or produce a result due to the joint and co-operating action of all the elements, and which is not the mere adding together of separate contributions. Otherwise it is only a mechanical juxtaposition, and not a vital union.

"In the case of this apparatus the mould was known, and a rib or former was known, and their use in combination was known. Salvétat described a rib, so arranged that, after it had performed its function in shaping the interior of the vessel, it could be with-

drawn, through the top of the vessel, so as not to produce injury by striking against its side. This rib Nimmo substituted for the old one in the same combination. And this is the whole of the invention. Upon the principle stated, there is no invention in it."

In the case of *Bussey v. Excelsior Manufacturing Co.*, 110 U. S. 131, the court had under consideration the patentability of combining a portable reservoir with an escape-pipe or flue forming a part of the reservoir, a warming-closet below a base-pan, and a damper. On page 146 the court uses the following language:

"A detachable base-pan existed before, and hearths and ash-pans existed attached by lugs and hooks in the same way as the defendant's base-pan. A portable reservoir was old, with an escape-pipe or flue forming a part of the reservoir. A damper for the middle flue was old. A warming-closet below a base-pan and that below a reservoir were old. In view of the state of the art there was no invention, in claim 1 of the patent, in using to attach the base-pan an old mode used in attaching other projecting parts of the stove. Claim 2 is merely for an aggregation of parts, and not for a patentable combination, there being no patentable relation between a portable reservoir with a flue in its rear side and the existence or portability of a base-pan beneath it. In claim 3 there is merely an aggregation of parts, there being no patentable relation between a damper for the middle flue of a

three-flue stove, and the existence or portability of a base-pan or the existence of a warming-closet."

In the case of *Boyer v. Roth, et al*, 132 U. S. 201, the court had under consideration the question of invention in a combination claim covering the drum and shifting device of a rawhide fulling machine used to twist leather. The new element in the combination was that of a shifting device which would automatically cause the drum to turn a given number of revolutions in one direction and then reverse and turn a like number of revolutions in the other direction. It appears that the drum was previously operated in the same manner for the treatment of rawhide, except that there was no automatic shifting device upon the same. By reason of not having an automatic shifting device the leather would sometimes be twisted too long in one direction before reversal of the machinery for twisting it in the other direction. The combination consists of attaching to this rawhide fulling machine an automatic shifting device, the same as had been previously used for operating a washing machine.

Near the end of the last paragraph of the opinion is found the following language:

"There is no patentable combination of the automatic shifting device with the drum of the fulling machine. It is a mere aggregation of parts. The shifting device operates automatically to reverse the action of the fulling machine, in precisely the same way that it operates when applied to any other ma-

chine; and, the shifting device being old, the application to the fulling machine did not require the exercise of invention."

In the case of *Office Specialty Mfg. Co. v. Metallic Mfg. Co.*, 174 U. S. 492, 43 Law. Ed. 1058, the court had under consideration the patentability of a book shelf, which combined a recessed portion in the front thereof, for grasping the books without interference with the rolls, and rolls at the sides and backs thereof, upon which the books could roll in place, similar to such as are now in general use in recorders' offices. The court held that the employment of semi-cylindrical hand holds or recesses for more readily grasping the books is such a familiar device in upright partitions for holding books that the court might properly take judicial knowledge of their long use. On page 498 is the following language:

"Putting Hoffman's patent in its most favorable light, it is very little, if anything, more than an aggregation of prior well known devices, each constituent of which aggregation performs its own appropriate function in the old way. Where a combination of old devices produces a new device, such combination is doubtless patentable, but where the combination is not one of new elements, but of old elements, and no new function is evolved from such combination, it falls within the rulings of this court in *Hailes v. Van Wormer*. (Also various other cases cited.) Hoffman may have succeeded in producing a shelf more convenient and more saleable than any which preceded it, but he has done it principally, if not wholly, by the exercise of mechanical skill."

SELECTED ELEMENTS.

In the case of *Turner v. Lauter Piano Co.*, 248 Fed. 930, the court had under consideration the question of patentability of the reinforcement of concrete. The reinforcement was effected by first placing perpendicular columns and then arranging rods so they would extend laterally in all directions from each column and would be near the upper surface of the slab or floor at the points over the column extending down so as to be near the lower edge of the floor or slab in between the columns. It was found that various means for reinforcing concrete had previously been used. Among others, one Turner had provided a means, using ordinary hog wire in extending from column to column. In summing up the situation the court came to the conclusion that the complainant had selected the best of known elements in their combination and had thereby produced a better product than had been priorly produced. Paragraph 2 of the syllabus very clearly sets forth what is thereafter stated in the latter part of the decision. This paragraph of the syllabus reads as follows:

“The union of selected elements from various sources in a patented structure may be an improvement upon anything the prior art contains; but if, in combining them, no novel idea is developed there is no patentable invention, however great the improvement may be.”

“To sustain a patent on a combination of old devices, it is well settled that a new result must be ob-

tained which is due to the joint and co-operating action of all the old elements. Either this must be accomplished, or a new machine of distinguished character and function must be constructed.' ” (Citing numerous cases.)

West Coast Safety Faucet Co. v. Jackson Brewing Co., (Ninth Circuit.) 117 Fed. 295, 298.

In the foregoing case the court had under consideration the combination of a screw-valve provided with steep threads with that of a thick washer between the faucet and its seat, concerning which the court said:

“Neither of these elements is new and no invention was required to bring them into play in the combination.”

“Undoubtedly the result is a more perfect machine, but is simply more perfect because of the cooperation of the great number of elements, and not because of any new function performed by the combination.”

Union Edge Setter Co.v. Keath, 139 U. S. 530.
(Next to last paragraph of opinion.)

ALL OF THE ELEMENTS NEED NOT BE FOUND IN A SINGLE ARTICLE.

To defeat a combination claim upon the ground that it is a mere aggregation of old elements, it is not necessary to find all of these old elements in a single machine, device, patent or publication. On the con-

trary, even though it may be necessary to search various articles, devices and publications of the prior art in order to find all of the elements, if they may thus be found, performing the same function which they perform in the combination claim, the claim will be invalid by reason of being a mere aggregation.

In the case of *Adams v. Bellarie Stamping Co.*, 141 U. S. 539, the appellant contended that the lower court had erred in refusing to instruct the jury that the finding of each element in some older patent would not necessarily defeat the combination patent. In the last two paragraphs of the opinion is found the following language:

“We do not perceive that in the ruling of the court any substantial error was committed. The elements combined to form the alleged invention merely constituted an aggregation of old devices, each working out its own effect, without producing anything novel, and such an assemblage or bringing together of old devices, without securing some new and useful result as the combined product of the combination,—something more than a mere aggregation of old results,—does not constitute a patentable invention. *Hailes v. Van Wormer*, 20 Wall. 353; *Pickering v. McCullough*, 104 U. S. 310. The court did not, therefore, err in refusing the instruction requested, that before the patent could be held invalid by reason of a prior patent it was not sufficient to find one of the elements in one patent, and second in another, and third in another. If the patent were for a combination of new or old elements, producing a new result, such instruction

might have been correct; but as it was merely a new aggregation of old elements, in which each element performed its old function, and no new result was produced by their combination, the instruction was not applicable, and was properly refused.

“Nor, under the circumstances, did the court err in declining to instruct the jury that the fact that the Irwin lantern had practically superseded all others was strong evidence of its novelty.”

In the case of *Hailes v. Van Wormer* heretofore referred to and so often cited by the courts, the various elements which went to make up the combination claim were scattered throughout the stove industry, some element being selected from one device, some from another, and others from still other devices.

In the case of *Pickering v. McCullough* heretofore referred to, the patentee had brought together elements selected from two different devices.

In the case of *Boyer v. Roth et al*, 132 U. S. 201, heretofore referred to, the patentee had brought together elements selected from the fulling machines, and others which he had selected from a washing machine.

In the case of *Duer v. Corbin Cabinet Lock Co.*, 149 U. S. 216, in the third paragraph of the decision the court uses the following language:

“All that he claims as invention is found in one or more of the prior patents.”

“Par. 5. But it is said that defendant has failed to show any single patent or prior publication which contains all the elements of any of the contested claims, and that ‘the question of anticipation’ cannot be determined upon a showing from the history of the art that one of the elements may be found here and another there and so on throughout the entire number. Clearly the facts of the present case do not admit of, much less require resort to such a course here; too many parts of the present structure are found, as we have seen, in a single prior patent, not to speak of their repetition in several earlier patents. It is true, however, that the method suggested by counsel might not of itself justify condemning a patent; it is equally plain that the suggestion is not an answer to the question that must be left here; it overlooks the evidential tendency of the prior art in a given case either to establish or negative the presence of invention. It scarcely need to be said that courts may and do look into the prior art for the purpose of ascertaining whether the elements of a claim are new or old and, if old, whether through the means of comparison so afforded, the skill of a mechanic, or indeed the faculty of the inventor, was required to organize the elements of the claim and to adapt them so as to accomplish the result attained. It is not perceived, nor do counsel suggest, what better source of information, what means more calculated to lead the mind to a right conclusion, can be found than in the prior art. True, prior art becomes at times a source of confusion and even abuse. Still, to insist that claims disclose invention or discovery where their substantial equivalency in elements, in mode

of operation and results, plainly appear in two or more earlier patents or publications, though not all in one patent or publication, is to ignore the very terms of the patent act. Above all, counsel's theory is opposed to settled course of judicial decision." (Citing numerous U. S. and Fed. cases.)

Keene v. New Idea Spreader Co., 231 Fed.
701, 708.

The case of Huebner-Toledo Breweries Co. v. Matthews Gravity Carrier Co., reported in 253 Fed. at page 435, is a good illustration of the distinction which should be constantly kept in mind between the mere advancements of the art and actual invention.

In this case the patent under consideration was for a gravity carrier, consisting of side rails parallel to each other, having rolls between the rails and at right angles thereto made of hollow metal tubing. At each end of this tubing was a cone upon a rod which extended longitudinally through the center or axis of the roll and the center or axis of the cone. A cup bearing or track was provided at each end of the roll so as to form a race in which balls were placed so that the rolls had ball bearings similar to those found in the ordinary bicycle.

In tracing the development of the prior art the court found that each of the elements of the patent carrier could be found in some other article performing a similar function, for example, the ball bearing was referred to as performing the same function that it performed in the bearing of the bicycle.

On page 446 is found the following language:

“(1) It must, of course, be conceded that patentable novelty may exist in a combination of old elements; but here the combination claims in suit are lacking in the usual and essential tests of invention. No new function of elements or new method of operation is evolved, and the result achieved is exactly the same as the old one. The settled rule under such facts is that to adapt an old and familiar device to another structure equally old and well known is not to exercise the inventive faculty; it is to apply the skill of the mechanic. (Citing numerous cases.) Page 447.

“(3) It is said appellee's carrier is not anticipated by any single patent; but it is not necessary to show complete anticipation in a single patent. The selection and putting together of the most desirable parts of different machines in the same or kindred art, making a new machine, but in which each part operates in the same way as it operated before and effects the same result, cannot be invention; such combinations are in the nature of things the evolutions of the mechanic's aptitude rather than the creations of the inventor's faculty. (Citing numerous cases.)

“(4) Assuming, as counsel claim, that large sales have been made of the carriers in issue, still commercial success is never a safe criterion, except in cases of doubtful validity of the patent; such success cannot aid claims that are clearly without patentable novelty.” (Citing numerous cases.)

In the case of *Ryan v. Hard*, 145 U. S. 241, the court had under consideration a patent bed bottom. The material described by the patentee as being ~~owned~~ in connection with this bottom was a woven wire fabric. The prior art disclosed that woven wire fabric had been previously used, but not in this particular combination, but that canvas had been used in the same combination in which the patentee used his woven wire fabric. On page 246, the court uses the following language:

"Is there patentable novelty in this change? It is thought not. If the patentees had been the first to introduce woven wire into the art, there would be more difficulty in reaching this conclusion, but they were not. All that they did was to suspend a fabric well known as a bed bottom in substantially the same manner that other fabrics used for that purpose had been suspended. If the patentees, instead of using woven wire had used some other woven fabric—woven twine or tape, for example—if their claims had included carpet or rubber cloth instead of woven wire, it will hardly be contended that they would be entitled to take rank as inventors. Why, then, should the use of woven wire give them this distinction? Its peculiar advantages above referred to as a material for beds were not discovered by them. The idea of swinging a bed bottom was not theirs. They have substituted one well known material for another, and nothing more."

BORROWING ELEMENTS FROM ANOTHER ART.

The Morgan block, British patent No. 712, defendant's Exhibits 3-0 and BB, the Labadie patent, defendant's Exhibits QQ, CC and DD, and the Ludford patent, defendant's Exhibits EE, FF and 3-D, are certainly a part of the prior art; but even if it should be conceded that they were merely from a related art, they destroy the validity of complainant's patent No. 977,613, as it would not constitute an exercise of the inventive faculty to improve the Morgan block combination by borrowing the idea of an interior oil reservoir in an integral side from the Labadie Butters and Ludford blocks, pp. 44, 164 and 104 Transcript of Exhibits.

"There would be no doubt of patentability, in my opinion, if the device as an entirety were new. Both claims in suit are for a combination in end plates and locking device, and, though both are old, the patent would be good like thousands of other similar combinations, if the combination itself were new. There is undoubtedly an improved result, but the combination shows improvements only, and not invention, for the following reason: With a number of existing combinations of end plates and locking devices operating by forcing a stud into a slot, the patentees adopted an improved locking device from the related art of automatically locking boxes, shipping cases, etc. The precise lock is found in the Lehy patent, with the T-slot, beveled lug, smaller shank portion, push button, and all. The sole difference is that the patentees have

not invented a new combination of old devices, but have merely improved an old combination. All the cases cited by complainant's counsel, as I read them, related to new combinations. This seems true of *Bates v. Coe*, 98 U. S. 31, 25 L. Ed. 68; *Imhaeuser v. Buerk*, 101 U. S. 647, 25 L. Ed. 945; *Parks v. Booth*, 102 U. S. 96, 26 L. Ed. 54; *Potts v. Creager*, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. E. 275, and *Hobbs v. Beach*, 108 U. S. 383, 21 Sup. Ct. 409, 45 L. Ed. 586. In the last case the Supreme Court went as far as possible in sustaining a combination having one element borrowed from another art, but the earlier machines did not as here possess an inferior or less complete method for doing the same work. The machine itself was sufficiently novel to satisfy the rule that a patentable combination of old things must itself possess novelty."

*Siebor & Trussel Mfg. Co. v. Chicago Binder
& File Co.*, 177 Fed. 439, 441.

THE ONE ALLEGED NEW ELEMENT WOULD NOT SAVE COMPLAINANT'S PATENT.

Defendant strenuously contends that there is nothing new from a patentable standpoint in the side provided with an oil reservoir described in complainant's patent. But even if it should be conceded that the same is a new element, it would not require the exercise of the inventive faculty, in view of the prior state of the art, to embody it in the combination described in complainant's patent.

"It is urged that one cannot justly treat a combination patent by treating its elements as though separate. To this I agree, but I know no other way of determining the validity of a combination patent than to see how far the prior art shows all the elements in combination. If it shows all but one, and the necessary step does not involve invention, the combination itself is void. That seems to me to be the case here."

Herzog v. Charles Keller & Co., 234 Fed. 86, 87.

Quoted and approved in Cutler Mail Chute Co. v. American Mailing Device Corporation, 247 Fed. 508, 514.

"Nor was the case bettered by substituting one new element, itself showing no invention, in an apparatus otherwise old, and calling it a combination."

Miner v. T. H. Symington Co., 247 Fed. 515, 521.

See Aeolian Co. v. Wanamaker, 234 Fed. 90, 91.

ONE INTEGRAL CASTING FORMING SIDE AND OIL CHAMBER

Defendant's Exhibits 4-C, 3-D, QQ and ZZ show that there was nothing new in providing a side in one integral casting containing an interior oil reservoir; but even if it should be conceded that complainant was the first to devise a one-piece reservoir block side, this would not constitute invention.

As early as 1893, in the case of Howard et al, v. Detriot Stove Works, 150 U. S. 164, the Supreme Court of the United States laid down the rule that making in one piece what had previously been made in several pieces did not constitute invention. Near the end of the decision the following language is used:

“At the date of this invention it was common to make wood burning grates partly open and partly closed with teeth at their ends, which serve exactly the same purpose as the teeth, D, of the patent. These grates are all used in cooking stoves and are rectangular in form, while the Beckwith patent is circular in shape; but it cannot be maintained that there is any element of invention in making the grate fit the particular fire box of the stove to be constructed. To accomplish that end mechanical skill alone is necessary, and it does not call for the exercise of inventive talent.”

Further on the court uses the following language:

“As to the third patent, it is void because the claims in it were clearly anticipated, and because it involves no invention to cast in one piece an article which has formerly been cast in two pieces, and put together; nor to make the shape of the grate correspond with that of the fire pot.”

In the case of Consolidated Electric Manufacturing Co. v. Holtzer, 67 Fed. 907, hereinabove referred to, the court had under consideration a claim covering

“An electric battery, and negative electroid, including cup, cover and lip, *cast solid*, with an opening

in the cover of the positive * * *. The only advance alleged to be covered by either claim is in the fact that the cover, cup, and lip are cast solid, instead of being made of several parts soldered together, or otherwise secured to each other. There is no question on the score of utility, and a cup cast solid and lip was novel in connection with an electric battery. Therefore, the only issue is whether the device in suit contains invention, within the meaning of the statutes touching patents for mechanical devices.

"The right to improve on prior devices by making solid castings in lieu of constructions of attached parts is so universal in the arts as to have become a common one, so that the burden rests upon any one who sets up this improvement in any particular instance as patentable, to show especial reasons to support his claim. Livermore, the complainant's expert, states that he does not know that any one of the features of complainant's device was of 'substantial novelty,' but that, so far as he knew, a battery containing all of these features was new. This covers only the matter of mere novelty; and so much as this may be said of any combination in any of the arts in which, for the first time, two or more parts are cast as one. Complainant relies upon the rule applied by this court in *Watson v. Stevens*, 2 C. C. A. 500, 51 Fed, 760, 761, and claims that prior workers in this art had sought to devise means for avoiding the necessity of joints between the negative electroid and the cover or lip, but had never succeeded. We fail to find any evidence of this in the record. *He also claims that the Holtzer*

battery speedily superseded all others of its general type, which claim is sustained by the proofs. But all such considerations are applied with caution to a very limited class of cases, otherwise doubtful, as is made clear in *Watson v. Stevens*, and in the opinions of the Supreme Court therein cited, and in cases decided by that court since *Watson v. Stevens*, of which the latest is *Olin v. Timpkin*, 155 U. S. 141, 155."

Again on page 909 we find:

"In the suit at bar, there are not facts enough, of the character applied in these cases, to justify this court in giving complainant a monopoly in this particular art of the privilege of replacing jointed parts by solid castings,—a privilege so common and so constantly exercised in all other arts. But it is said a new result has been accomplished. This is a proposition which sometimes throws light on questions of this character, sometimes does not, and occasionally so appeals to the imagination as to be misleading. Every novelty, in some sense, brings a new result; but whether the new result is such, within the meaning of the decisions, is a very different question. These words are very far from furnishing a universal solvent. Sometimes the character of the new result is such as appeals directly to the trained mind as well as to the ordinary one. But usually the novelty of the result is only one fact to be weighed in the mass with others. In the case at bar it is of an unimportant character, in one aspect urged by the complainant, and, in the other aspect urged by him, is so common and universal as not to be of any

weight. The patent, in its specifications, looks only to the results of 'fewer parts and more simple construction,' and of producing an electroid 'very strong and durable,' which may be 'handled without fear of separation.' These are not new results, but are the ordinary consequences of dispensing with joints by casting solid, well known in all arts."

In the case of *Strauss v. Blumenthal*, 108 Fed. 841, the patentee had improved a harmonica, or mouth organ, making in one piece or integral the corrugated covering device, which was formerly made in two pieces. It was held that this did not constitute invention.

In the case of *Standard Caster Co. v. Caster Socket Co.*, 113 Fed. 162, 164, the court decided that the making of a caster socket with a spring integral with one half the socket did not constitute invention, as the prior art disclosed a socket having a spring attached thereto with rivets.

In the case of *Australian Knitting Co. v. Gormly*, 138 Fed. 92, 107, the court had under consideration a combination claim for a knitting machine. In the knitting machines disclosed by the prior art different patterns could be obtained by wholly or partially filling in the spaces between some of the blades, and it had been the custom partly or wholly to fill in these spaces by running a solder or lead. The patentee in the case under consideration provided blades with integral pro-

jections upon their sides which would serve the purpose of partially or wholly filling in the spaces as desired, which blades could be so arranged as to meet the requirements of the pattern to be made. The court held that the making of the blade integral with the filler to take the place of the soldering or riveting of projections thereon did not amount to invention.

“The court below reached the conclusion that ‘complainant’s device consists merely in making in one piece that which was formerly in two parts and performs no new function;’ and that ‘the production of a seamless insulating lining having a shoulder intermediate its length required nothing more than the knowledge of the trained engineer or workman.’ The correctness of this conclusion is challenged on the following grounds: ‘The fact that Palmer’s lining is made in one piece is only incidental. The important fact is that Painter’s lining is made without open seams or breaks exposing the metallic shell to electrical contact from the inside, * * * the important thing being the continuity of the insulating barrier,’ which introduced ‘a new construction, involving a new function,’ dependent upon ‘the discovery that a thin sheet-like tube of insulating fiber could be subjected to this character of compression,’ etc., and that this was not obvious, but ‘involved the exercise of the inventive faculty.’ ”

On page 570 is found the following language:

“The single question herein is whether this new construction ‘involved the exercise of the inventive faculty.’ The prior art shows and the patent admits that

such a lining in two pieces was old. That it does not involve invention merely to make such a lining in one piece is well settled." (Citing *Howard v. Detroit Stove Works* and *Standard Caster & Wheel Co. v. Caster Socket Co.*, 113 Fed. 162.) "*Nor would the mere fact that the one piece device was cheaper or more durable constitute invention when such result was merely such ordinary consequences of dispensing with joints as would naturally be anticipated by the workman.*" (Citing *Consolidated Electric Mfg. Co. v. Holtzer*, 67 Fed. 907, and *Standard Caster & Wheel Co. v. Caster & Socket Co.*, *Supra.*)

General Electric Co. v. Yost Mfg. Co., 139 Fed. 568, 569, 570.

In the case of *Lawson v. Metal Products Co.*, 209 Fed. 51, the court had under consideration the following claim:

"(3) The improved gem setting herein described consists of a body portion having an internal seat adapted to receive a gem, an integral flange extending from the top outline of said seat, and ornamental structures extending integrally from the base of said portion and from the outer surface thereof and in a plane substantially parallel to the plane passing through said seat, substantially as and for the purpose set forth.

"The specification says as follows:

" 'My invention relates to an improvement in jewel settings, and has for its object the making of various connections and ornaments integral with the box setting or gem setting now in common use.' So far as

this common use is concerned it is only necessary to refer to the patent issued to Geo. Wm. Dover, No. 795,109, of July 18, 1905, which contains everything claimed by the patentee here, excepting what is covered by the words in Claim 3 as follows: 'And ornamental structures extending integrally from the base of said body portion and from the outer surface thereof and in a plane substantially parallel to the plane passing through said seat.' The District Court dismissed the bill for want of patentability, without reference to the question of infringement, basing the want of patentability upon the Dover patent. * * *

"The learned judge of the District Court evidently thought that the Dover patent showed a construction which did not completely anticipate the patent in suit because *it did not cover ornamental extensions which were integral with the box settings*. That was the way he described the addition made by the patent in suit to the prior art. If there was no such addition, then the Dover device was properly an anticipation. If he was in error about this, then we must apply the rule well explained as follows:

"Walker on Patents, 4th Ed., 1904, Sec. 599, explained with reference to cases in which the court will take judicial notice of the matter of patentability. The propositions stated by Mr. Walker are very carefully guarded and properly limited. We think this case comes within those propositions with all their limitations. The alleged invention comes down to a mere matter of building solid what was formerly soldered together."

The court then goes on to quote the language hereinabove quoted from the case of Consolidated Electric Mfg. Co. v. Holtzer, *Supra* and reviews various other cases in which the same conclusion was reached.

In the case of Herzog v. Chas. Keller Co., 234 Fed. 86, the court had under consideration the patentability of a one-piece button. At page 87 is found a review of some of the cases hereinbefore cited, in the following language:

"(3) The only possible invention involved in the patent is to make out of one piece Henerlau's or Ball's button. In view of Hill's patent for a one-piece button, this can hardly be regarded as invention; indeed, it would scarcely have been invention even if Hill had not shown a one-piece button. Howard v. Detroit Stove Works, 150 U. S. 164, 14 Sup. Ct. 68, 37 L. Ed. 1039; General Electric v. Yost, 139 Fed. 568, 71 C. C. A. 552; Lawson v. Metal Products Co., 209 Fed. 51, 126 C. C. A. 193. I do not mean that these cases decided that it is never invention to consolidate into one piece what has formerly been composed of three pieces. This may at times result in a consolidation of functions. *The case must, however, be very rare in which the bare idea involves invention to consolidate several members into one.* To overcome difficulties of manufacture involved in such a change may involve the very highest invention; but since the patent does not concern such difficulties, it must rest solely upon the idea of the integrity of the button."

THE PATENTS SOLVE NO PROBLEM AND DO NOT INVOLVE INVENTION

The only specific problems which the specifications of patent No. 977,613 indicate that the patentee was seeking to solve were:

“Providing a pulley (*sic*) which will contain a considerable quantity of lubricant, and feed the same, automatically and slowly, upon the bearing pin of the pulley.” (Lines 24 to 28, page 1 of specification.)
and

“To provide a pulley, (*sic*) the bearing pin of which is adequately protected against dirt and dust.” (Lines 33 to 35, page 1 of specifications.)

The first of these problems had been solved by Labadie, defendant's Exhibits CC and DD; Ludford, defendant's Exhibits EE and FF, and Morgan, defendant's Exhibit BB, and both the first and second of these problems had been solved by practically all logging supply houses in the Pacific Northwest. (See Columbia Steel Co.'s blocks, defendant's Exhibits I and GG, elbow and elbow extension blocks, defendant's Exhibits C and D.) (See also Hammond patent No. 876,176, defendant's Exhibit 3-H.)

At no place in the specification is it indicated that the patentee was seeking to provide a pulley block better able to withstand the strains and knocks of usage.

“Unless Hutcheson in adapting Cochran's roll separating means, has solved some real problem or has contributed some new and useful thing to the art, he

has not made an advance which entitles him to a patent. After careful study of the record, we are satisfied that whatever merit may be contained in Hutcheson's idea of a true rectilinear path, it does not involve invention."

Standard Tobacco Stemming Co. v. Tobacco Stemming Machine Co., 247 Fed. 112,116.

See last paragraph p. 74, also pp. 95 to 100 of this brief.

A NEW UNITARY RESULT

What constitutes a new unitary result which may furnish the foundation for a valid patent is well defined by the courts in the following quotations:

"The feature relied upon as differentiating the patent in suit from the prior art, and as constituting invention, is the unitary nature of the mechanism, in that it has only a single means of attachment to the tank, which means of attachment carries both elements of the operating mechanism, including the integral sleeve. As stated in the patent specification, 'both the center of the operating shaft 13 and also the center on which the valve operating lever 9 is fulcrumed are carried on' one fitting; viz. the plate 3 on the inner side of the tank-wall; whereas, as also said in the specification, 'with all prior valve mechanism the tank or wall had to have separately attached thereto at least two centers, sometimes more.' This construction makes the device more readily and accurately attachable, in that it dispenses with the necessity of positioning the fulcrum pin and the actuating lever 13 relatively to

each other (thus removing danger from unskilled or careless workmanship), and requires but one hole in the tank wall; it being practically necessary in the case of porcelain and enameled iron tanks to have the holes made at the factory. The unitary construction of course also makes the fixture more readily detachable, less liable to get out of order, and apparently less expensive. *The question is: Does this unitary construction alone amount to invention? It is clear that the operation of the device is precisely the same in all respects whether the pin 8, on which the lever 9 is fulcrumed, is an integral part of the plate 3 or whether it is inserted from the outside through the tank wall and directly secured thereto, instead of being indirectly so secured, by being part of the otherwise secured plate 3.* in the former case the device of the patent would plainly lack invention.

“This unitary construction of a flush-valve mechanism of the inner wall of the tank was apparently new, although White had in 1889 (Patent No. 398,681) shown a construction whereby the valve-operating lever and the hand-actuated lever (which had a cam connection) are both fulcrumed upon an integral bracket upon the upper edge of the tank, presumably of the elevated type. White’s mechanism was of the chain type, and his lever oscillated in but one direction.

“Neither of the references cited by defendant show anticipation. But the question we are dealing with is not one of anticipation, but of invention; and upon the question whether the device of the patent involves more

than the skill of the mechanic, neither White nor the reference to the lock and latch art are wholly irrelevant.

“(2-3) All elements of the prior art have a bearing upon the question whether there is invention in the device under consideration (*Zimmerman v. Advance Machinery Co.*, 232 Fed. 866,—C. C. A.—decided by this court april 10th last); and *it is not necessary to a finding of lack of invention that every element be found in one embodiment of the prior art* (*Keene v. New Idea Spreader Co.*, 231 Fed. 701,—C. C. A.—decided by this court March 17th, 1916.) *It is not invention merely to combine into one unitary structure mechanism formerly made in separate pieces, so long as each element operates in the same way to produce the same result.* *Caster Co. v. Caster Co.* (C. C. A. 6,) 113 Fed. 162, 168, 51 C. C. A. 109; *Eames v. Worcester Institute* (C. C. A. 6) 123 Fed. 67, 73, 60 C. C. A. 37, and cases cited; *Herman v. Youngstown Car Mfg. Co.* (C. C. A. 6) 191 Fed. 579, 586, 112 C. C. A. 185; *Gould v. Cincinnati Shaper Co.* (C. C. A. 6) 194 Fed. 680, 685, 115 C. C. A. 74. And while that proposition is not conclusive of the problem here, it is not without pertinency, for here the relative arrangement of the several parts of the valve-operating mechanism is the same, and each performs its mechanical functions in precisely the same way as if they were mounted separately instead of as parts of a unitary construction—and this without addition or adaption.

“The device of the patent in suit is not a new machine. The only problem solved is one of convenience and usefulness, resulting only from the unitary mount-

ing. It fairly expresses the applicant's advance to say that they assembled upon one supporting frame the same operating parts which had before been carried upon separate supporting members, and that these parts accomplished the same operative result in the same essential inter-relation, after the reassembling as before."

Ft. Pitt Supply Co. v. Ireland & Matthews Mfg. Co., 232 Fed. 873, 875.

"The appellant's contention, however, is that the six mechanical features called for by its patent have therein a special and peculiar relation to each other, which is essential to the adjustment of the skirt to large and small figures, without destroying the fit, and are so combined as to act and react on each other for the purpose of producing the desired results, thus constituting a true combination of mutually co-active parts; and that, when so combined, they serve to secure several advantages, which are thus recapitulated in the appellants brief:

"(1): Holding the skirt in place;

"(2): Causing it to conform to the figure and yield readily to the different motions of the wearer;

"(3): Adapting it to be adjusted to different sized figures;

"(4): Providing registry between the placket of the under and outer garment;

"(5): Concealing the fastening devices;

“(6): Preventing the fastening devices from coming in contact with the garment;

“(7): Adapting it to be employed in connection with all changing styles and fashions.

“Clearly, however, as appears both from the structure of the patent itself and the several advantages thus enumerated, the effect of its several mechanical features is not to secure one new unitary result or advantage by the reaction of their several functions, but rather to secure, through the several mechanical features, acting largely independently of each other, various results and advantages, relating in the main, to entirely separate and independent matters, and resulting from the assemblage of these various mechanical features in one structure in the form of an aggregation rather than a combination. Thus, without analyzing in detail the functions of these several mechanical features, it may be said, by way of illustration, that the three wings projecting from the back width under the flap of the placket obviously have no function in either holding the skirt in place, causing it to conform to the motions of the body, adjusting it to differently sized figures, concealing the fastening devices, or preventing wear and tear therefrom, but relate, at the most to the prevention of exposure through the placket opening and to the fit and appearance of the flap over the placket opening; in other words, that these three wings underlying the flap do not in any manner co-act with the other mechanical features of the plaintiff's structure in producing the other results and advantages which they independently obtain.

"Since, therefore, the assemblage in this patent of the old elements from the garment making art does not produce a new unitary organization due to the joint and co-operating action of the old elements, but constitutes, in its essential features, a mere aggregation of old elements, in which, in the main, each performs its own appropriate function in substantially the old way, the result must, under the well established rule, be held to constitute a mere aggregation of elements and not a patentable combination." (Citing numerous cases.)

Jackson Skirt & Novelty Co. v. Rosenbaum, 225 Fed. 531, 533.

"But it is urged on behalf of the appellee that the Hall patent differs from all previous devices in presenting a structure which, as an entirety, is radially expansible in all directions from a common center, so as to preserve the symmetry of the form, whatever its diameter may be, and by the combination of the patent a new and useful result is thus obtained, which involvss patentable novelty. In support of the validity of the patent, the principle stated in Loom Co. v. Higgins, 105 U. S. 591 is invoked. In that case it was laid down by the court as a general rule, though not an invariable one, 'that if a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention.' But we do not consider the Hall patent as coming within the principle there laid down, for the reason that the standard, the double braces, sliding blocks on the standard, and the rests to hold the

blocks, as well as the ribs, which constitute the combination of the second claim, were not only found in prior devices, but they separately, and in combination with such devices, performed the same function, and operated in substantially the same way, as in the Hall patent. *The combination of old elements which perform no new results, does not involve patentable novelty.*" (Citing numerous cases.)

Knapp et al v. Morss, 150 U. S. 228, Sixth paragraph from end of opinion, Page 84 of Vol. 14, Natl. Rep. System.

ADAPTING MACHINE TO NEW USE

The Morgan patent, defendant's Exhibit BB, describes a pulley block which could be used in logging operations without any change in construction, but if it should be considered that it would make it a more practical block to cast in one integral piece the side containing the oil reservoir such a change would not amount to invention, as it does not involve the inventive faculty to adapt a machine to a particular use.

In the case of Dilg et al v. Borgfeldt & Co., 189 Fed. 588, the court had under consideration the patentability of a cutlery polishing machine. On page 590 of the reported case is found the following language:

"Examining the prior art, we find that the field was quite crowded when the patentees came into it. Earlier patents disclose cutlery polishing and grinding devices having mechanism for moving one polishing or grind-

ing wheel toward the other; and, although all the elements of the claim may not be found in any one patent, it is clear that they are to be found in different patents. No single patent may anticipate, but they all have a bearing upon the question whether invention or mechanical skill was involved or required."

In referring to the change from a grinding machine to a polishing machine made by the claimants in lowering an operating shaft so that it would be out of the way of the tools, the court uses the following language beginning near the bottom of page 590:

"But in using the machine for polishing, the knife would necessarily be lowered between the bumping rolls and the drive-shaft might be in the way. In our opinion, especially in view of the prior patent, it required no more than mechanical skill to obviate the difficulty by locating the driving-shaft below the plane of the wheel-shaft and thus putting it out of the way.

"While we have no doubt that the complainant's machine has been commercially successful, we are by no means satisfied that there was a period of groping and that the complainant succeeded where others failed. Even if such were the case it would not be sufficient to show invention here.

"We also recognize the complainant's contention that although every element of the combination may be old, yet the combination itself may be patentable. But a combination is not patentable unless it shows invention, and in view of the cutlery grinding and polishing machines of the prior art, we find no invention in the present case."

**THAT WHICH WOULD INFRINGE IF LATER,
ANTICIPATES IF EARLIER.**

“There is another test as to the validity of the second claim: If Balch, Everett, Wilson or Ferris patents, or even the umbrella, were subsequent in date to that of the Hall patent, they would constitute infringement thereof, for the rule is well settled that ‘that which infringes if later would anticipate if earlier.’” (Citing *Peters v. Mfg. Co.*, 129 U. S. 530, 537; *Heating Co. v. Burdis*, 121 U. S. 286, 295; *Grant v. Walter*, 148 U. S. 554; *Gordon v. Warder*, 150 U. S. 47.)

Knapp et al v. Morss, 150 U. S. 228.

In the foregoing case the court had under consideration improvements “in dress forms in which the rods are connected near their top and bottom extremities to braces or stretchers, which extend obliquely from the ribs to the standard and are there concentrated, and hinged on small movable collars which encircle the standard.” By changing the position of the movable collars the form would be expanded or contracted to the desired position in a manner similar to that in which an umbrella is opened or closed.

If the Supreme Court of the United States considered an umbrella as an anticipation to an invention for a dress form, it certainly must be conceded that any of the pulley blocks or patents for pulley blocks which have been referred to by the defendant in this case should be considered as a part of the prior art. If there

be no novelty in the expansion means of a dress form by reasons of the umbrella, there certainly would be no novelty, and it would not involve invention, to select the integral side of the Ludford pulley block and adapt it for use on the Morgan block.

EQUIVALENCY OF DEVICES.

By applying the rule "The Claim Measures the Invention," the Morgan block, defendant's Exhibit BB, is a letter-perfect anticipation of Claim 1 of complainant's patent No. 977,613. Each of the other claims in issue in this case are likewise anticipated by both patents and devices of the prior art. But even if the complainant should not be limited to the language of his claims and should be permitted the broadest construction which could be placed upon the article as actually manufactured, he would still encounter the rule of law concerning equivalents, which would destroy the validity of his patents, for in the patent law the equivalent of an element or device is the same as the thing itself, and that which would infringe if later anticipates if earlier.

In the case of *Union Paper Bag Machine Co. v. Murphy*, 97 U. S. 120, the court had under consideration the question of the infringement of a patent for a paper bag machine. In one of the machines the paper was cut by a knife having five planes so arranged as to automatically rise and fall upon the paper, cutting the same; while in the other machine a knife with a serrated edge was attached to the bed of the

machine on line with the feed rolls, so that the paper would pass over it freely, and the paper was cut by means of a straight piece of metal made to revolve with a shaft in such a way as to strike the paper and throw it sharply down on the serrated knife, whereby the paper would be severed as effectually as by the cutter of the other machine. On page 125 of the reported case is found the following language:

“Except where form is of the essence of the invention, it has but little weight in the decision of such an issue, the correct rule being that, in determining the question of infringement, the court or jury, as the case may be, are not to judge about similarities or differences by the names of things, but are to look at the machines or their several devices or elements in the light of what they do, or what office or function they perform, and how they perform it, and to find that *one thing is substantially the same as another, if it performs substantially the same function in substantially the same way to obtain the same results, always bearing in mind that devices in a patented machine are different in the sense of the patent law when they perform different functions or in a different way, or produce a substantially different result.*

“Nor is it safe to give much heed to the fact that the corresponding device in two machines organized to accomplish the same result is different in shape or form the one from the other, *as it is necessary in every such investigation to look at the mode of operation or the way that the device works* and at the result, as well as at the means by which the result is attained.

"Inquiries of this kind are found attended with difficulties; but if such attention is given to such portions of a given device as really does the work, so as not to give undue importance to other parts of the same which are only used as a convenient mode of constructing the entire device, the difficulty attending the investigation will be greatly diminished, if not entirely overcome."

"(3) Upon careful consideration of the prior art and giving due weight to well established utility of plaintiff's device and its highly favorable commercial reception, we are unable to find in it room for invention. The most which, to our minds, can be said is that the inventor has, in the exercise of a high degree of mechanical skill, selected and put together the most desirable parts of different devices in the same art, making a new structure, doubtless better than any which preceded it, but in which each part operates in substantially the same way as it did in the old and effects substantially the same result. 'This is not invention.' (Citing cases.)

Edwards v. Dayton Mfg. Co., 257 Fed. 980, 983.

"A patentable invention is a mental result. It must be new and shown to be of practical utility. Everything within the domain of the conception belongs to him who conceived it. The machine, process, or product is but its material reflex and embodiment. A new idea may be ingrafted upon an old invention, be distinct from the conception which preceded it, and be an improvement. In such case it is patentable. The prior patentee cannot use it without the consent of the im-

prover, and the latter cannot use the original invention without the consent of the former. But a mere carrying forward or new or more extended application of the original thought, a change only in form, proportions, or degree, the substitution of equivalents, doing substantially the same thing in the same way by substantially the same means with better results, is not such invention as will sustain a patent. These rules apply alike, whether what preceded was covered by a patent or rested only in public knowledge and use. In neither case can there be an invasion of such domain and an appropriation of anything found there. In one case everything belongs to the prior patentee, in the other, to the public at large."

Smith v. Nichols, 21 Wall. 112, 118.

NOT A NEW MACHINE.

The Century Dictionary 1889, defines the word "pulley" to mean:

"(1a) Properly, a simple machine consisting of a wheel having a grooved rim for carrying a rope or other line, and turning in a frame which, when movable, is termed a *pulley-block*."

The foregoing definition serves to establish the meaning of the term "pulley-block" as early as the year 1889, although the thing and its name are both of ancient origin.

It might, therefore, be accepted to establish the fact that a pulley-block is a machine; but the patent law makes distinction between a "machine" and an "improvement thereof."

In the eye of the patent law, a machine "is an artificial organism, governed by a permanent artificial rule of action." (Robinson on Patents, Vol. 1, Sec. 173.)

"The unity of a machine also resides in the same rule of action. Whether composed of a single organism or of several subordinate organisms, as a machine it is a unit, and is destroyed whenever any change, addition, or withdrawal of its elements results in the alteration of its structural law. While this law remains undisturbed, any such change, addition or subtraction is at the most an improvement on the old machine, however marked may be the effect produced upon its shape or usefulness." (Ib. Sec. 179.)

"Nor is it safe to give much heed to the fact that the corresponding device in two machines organized to accomplish the same result is different in shape or form the one from the other, as it is necessary in every such investigation to look at the mode of operation or the way that the device works and at the result, as well as at the means by which the result is attained."

Union Paper Bag Machine Co. v. Murphy, 97
U. S. 120, 24 L. Ed. 936.

The mode of operation of the pulley block described in the Gilchrist patent is exactly the same as the mode of operation of the Morgan pulley block. The result accomplished by the operation thereof is the same in all pulley blocks, namely: that of carrying and guiding a rope or cable.

The result being the same and the mode of opera-

tion of the pulley blocks described in the Gilchrist patents being the same as the mode of operation in the Morgan pulley block and other auto-lubricating pulley blocks, the machine cannot be a new machine, no matter how great an improvement or advancement may have been made in the construction of the same.

The patentee has claimed a new machine, but in view of the prior art he has not described a new machine and his claims are therefore defective, if not absolutely void. (R. S. Sec. 4888.)

If a patentee applies for a patent upon an improvement in an existing machine, he must distinguish the new from the old, and confine his patent to such parts only as are new, for if both are mixed up together and a patent is taken for the whole, it is void.

Lowell v. Lewis, Fed. Case 8568;

Sullivan v. Redfield, Fed. Case 13597;

Blake v. Sperry, Fed. Case 1503;

Brooks v. Jenkins, Fed. Case 1953;

Hovey v. Stephens, Fed. Case 6746;

Stanley, etc. Co. v. Davis, 22 Fed. Case 1054.

In the case of *Evans v. Eaton*, 7 Wheat. 356, 5 L. Ed. 472, the plaintiff brought an action for an infringement of a patent alleged to be: First, for the whole of the machine employed in the manufacture of flour, called the hopper-boy. Second, for an improvement on the hopper-boy. The defendant alleged

that the plaintiff was not the original inventor of, but that the same was in use prior to the plaintiff's patent of the hopper-boy as patented, and that his patent for an improvement was bad because the nature and extent of the improvement was not stated in his specifications, and if it had been, still the patent comprehends the whole machine, and is therefore too broad. The lower court interpreted the law as requiring the patentee to specifically point out his improvements if the patent was not for a new machine embodying a new mode of operation.

Beginning on page 434 (491), Justice Story, in delivering the opinion of the court, uses the following language:

“Nothing can be more direct than the very words of the act. The specification must describe the invention in ‘such full, clear and distinct terms as to distinguish the same from all other makes before known.’ How can that be a sufficient specification of an improvement in a machine which does not distinguish what the improvement is, nor state in what it consists, nor how far the invention extends, which describes the machine fully and accurately as a whole, mixing up the new and the old, but does not in the slightest degree explain what is the nature or limit of the improvement which the party claims as his own. It seems to us perfectly clear such a specification is indispensable. We do not say that the party is bound to describe the old machine, but we are of the opinion that he ought to describe what his own improvement is, and to limit his patent to such im-

provement. But the law is sufficiently complied with in relation to the other points by distinguishing in full, clear and exact terms the nature and extent of his improvement only.

"We do not consider that the opinion of the Circuit Court differs, in any material respect from this exposition of the patent act on this point; and if the plaintiff's patent is to be considered as a patent for an improvement upon existing hopper-boy it is defective in not specifying that improvement, and therefore the plaintiff ought not to recover."

In the case of *Jacobs Mfg. Co. v. T. R. Almond Mfg. Co.*, 177 Fed. 935, the court had under consideration the claim for a patent upon a drill chuck which had proved itself of considerable utility and was earnestly sought upon the market. On page 936 the court uses the following language:

"The specification does not indicate how much is new or what is the improvement on the old art. The claims would indicate that the entire device was the product of Jacobs. It is fairly obnoxious to the criticism expressed of a similar obscure and misleading patent in *Evans v. Eaton*, 7 Wheat. 356, 5 L. Ed. 472. But passing that technical objection we have the question: Is it invention entitling a person to the monopoly of a patent to add teeth and a key with cogs to effect motion to the operating sleeve of a drill-chuck when such device for imparting motion is well known in many arts, and in this very art had been applied to move the operating parts of chucks

of another type (as in Whiton and Washburn)? We are clearly of the opinion that it is not and do not find the circumstance that the improvement has had large sales persuasive to the contrary. The toothed key is, no doubt, bought because it is more useful and convenient than the fingers or a spanner; but utility alone is not enough to establish invention."

In the case of *Wheeler v. James*, 189 Fed. 898, the court had under consideration a claim to a carburetor wherein the patentee had not properly described his invention. On page 901 the court uses the following language:

"If he had claimed a combination of old parts in such a way that a new method was involved, then he might claim the method as a result of the use of those or any equivalent parts. But Schebler does not seek to do this. He has tried to claim as invention the general idea of a carbureter of any type (although his type was plainly taught in his earlier patent) with the ideas presented by Krebs and Pidgeon (to say nothing of Dawson and Krastin), and to protect this wide basic proposition by adding interchangeability. Did he thereby get a valid patent even for the idea of interchangeability? It seems impossible to so hold. The details of the drawings and specifications are not even alleged to be invented by him. He has stated them as premises, and they might have been invented by anyone. He then claims, not these parts or their method of use or their combination, but, on the other

hand, general ideas which were unpatentable, and claims which would be infringed by many devices patented long before. Apparently such claims should have been refused by the patent office. He should have been compelled to state what he described, and what he really seems to have invented and intended. He cannot now be heard to say that his broad claims are really limited and explained by the drawings and specifications which are not by reference or description made a part thereof."

Again on page 902:

"The scope of a claim is set forth in *White v. Dunbar*, 119 U. S. 51, 7 Sup. Ct. 72, 30 L. Ed. 303, in which it is held that the context—i. e., the specifications—'may be resorted to for better understanding the meaning of the claim, but not for the purpose of changing it and making it different from what it is.' This patent is not like those in *McCarty v. Railroad Co.*, 160 U. S. 110, 16 Sup. Ct. 240, 40 L. Ed. 358, or *U. S. Repair and Guaranty Co. v. Assyrian Asphalt Co.*, 183 U. S. 591, where the claims were narrower than the specifications, and an attempt was made to show that the patentee had really invented everything covered by the specifications. In these cases the court held that infringement of the claims could not be found because of infringement of the ideas which they had been intended to cover. The case of *Evans v. Eaton*, 7 Wheat. 356, 5 L. Ed. 472, is more nearly in point. As, also, *Consolidated Bunting Apparatus Co. v. Metropolitan Brewing Co.*, 60

Fed. 93; *Excelsior Needle Co. v. Morse-Keefer Cycle-Supply Co.*, 101 Fed. 448, 41 C. C. A. 448, and *Edison v. American Mutoscope Co.*, 114 Fed. 926. In these cases it was held that a patentee could not after using broad claims show that a narrower construction was meant or could be surmised from the specifications, nor could the court work out the real invention so as to define the inventor's meaning as he should have stated it. See, also, Walker on Patents, p. 170, par. 181, and 2 Robinson on Patents, pp. 139, 140.

"A reissue would seem to be necessary before Schebler can prove infringement of any valid claim, and, as the case stands, the defendants should have decrees."

In the case of *Idorne v. Winkle*, Fed. Case 10,432, Vol. 18, Fed. Cases, page 581, Judge Story, in charging the jury as to the law of the case concerning the distinction between a patent for a machine and an improvement of a machine, used the following language:

"The original inventor of a machine is exclusively entitled to a patent for it. If another person invent an improvement on such machine, he can entitle himself to a patent for such improvement only, and does not thereby acquire a right to patent and use the original machine; and if he does procure a patent for the whole of such a machine with the improvement, and not for the improvement only, his patent is too broad, and therefore void * * * *"

To illustrate these positions, suppose a watch was first invented by a person, so as to mark the hours only, and another person added the work to mark the minutes, and a third the seconds; each of them using the same combinations and mode of operation to mark the hours as the first. In such a case the inventor of the second hand could not have entitled himself to a patent improving the invention of the others. Each inventor would undoubtedly be entitled to his own invention and no more. In the machines before the court there are three great stages in the operation, each producing a given and distinct effect; first the cutting of the wire for the nail; second the gripping of the nail; third the heading of the nail. If one person had invented the cutting, a second the gripping and a third the heading, it is clear that neither could entitle himself to a patent for the whole of the machine, which improved the invention of the other two, and by the same mode of operation produced the same effect, and, if he did, his patent would be void. (Page 582).

WHAT IS A NEW RESULT.

A new result within the meaning of the patent law in referring to a combination patent made up by the bringing together of old elements requires that there must be some change of function by the co-action of these elements, by which some of the elements perform some function which they have never performed before in the prior art. This rule is well laid down in the last paragraph of the opinion in the case of *Wright v.*

Yuengling, 155 U. S. 47, 39 L. Ed. 64, which reads as follows:

“Wright’s only invention, then, was in the combination of the cylindrical guide with the trough shown in the Farrar patent. Did this accomplish a new and valuable result it is quite possible that a patent therefore might have been sustained, but we do not find this to be the case. The cylindrical guide performs the same functions as in the prior patents; the trough, in which the connecting rod works in the Farrar patent, is practically the same as in the Wright patent; and the combination is a mere aggregation of their respective functions. If the combination of the trough and cylindrical guide of the Wright patent gives greater lightness and strength to the frame than the combination of the trough and the flat guides of the Farrar patent, it is a mere difference in degree, a carrying forward of an old idea, a result, perhaps, somewhat more perfect than had theretofore been attained, but not rising to the dignity of invention. We have repeatedly held patents of this description to be invalid.”

(For other cases see Points and Authorities under heading “A New Unitary Result.”)

What constitutes a new result within the meaning of the patent law is well illustrated by the case of *Thatcher Heating Co. v. Burtis*, 121 U. S. 293, 30 L. Ed. 942.

In this case the court had under consideration a combination patent for an improvement of a fireplace heater. The case is so similar in several of its features

to the one now under consideration by the Court that I feel the following quotation therefrom may be of interest to the Court:

"I have so combined three elements or features as to produce an important result. These features are as follows: First, a cylinder or body of the heater projecting outward from the frame or mantel; second, a feeder or fuel magazine within the cylinder; and, thirdly, an opening through which the said magazine can be fed from above. While fireplace stoves or heaters with protuberant cylinders and feeders or magazines were known prior to the date of my invention, I am not aware that the above combination of three features above referred to—namely, a top-feeding arrangement, a protuberant cylinder permitting such an arrangement, and a magazine within the cylinder—has ever been known or used prior to my invention of the same. It has been the practice to so construct base-burning fireplace stoves or heaters that the fuel had to be introduced into the feeder or magazine through a doorway in front; hence the magazine was of a very limited capacity. By so arranging the feed-hole, however, that the fuel can be introduced into the magazine from above, the capacity of the magazine is increased—a result which I especially aimed at in adopting the first part of my invention, namely, the above-mentioned combination, and in the production of my top-feeding, base-burning fireplace stove. The second part of my invention consists in extending the feeder or magazine to the feed-hole of fireplace stoves. This not only increases the capacity of the magazine to some extent,

but an uninterrupted passage or guide is afforded for the introduction of fuel into the magazine through the opening in the outer casing. The capacity of the magazine is still further increased, in the present instance, by carrying the feeder up above the top of the heater, by placing thereon a movable section, *o*, furnished with a cover, *O*¹, which has to be lifted off when coal has to be introduced into the magazine.

“The first and second claims, which are alone involved in this controversy, are as follows: ‘(1) A base-burning, fireplace stove, in which are combined the following elements, namely, a cylinder or body projecting outward from the mantel or frame, a fuel magazine or feeder within the cylinder, and an opening through which the said magazine can be fed from above. (2) A fireplace stove or heater, in which the magazine is extended to the feed-opening of the outer casing.’

“The case turned in the circuit court on the question of the validity of the patent on the ground of want of novelty in the invention in view of the state of the art at its date. In passing upon this question on final hearing, Judge Wallace, in his opinion, stated the grounds of his decree dismissing the bill, as follows: ‘It is conceded that these claims are to be construed broadly, so as to cover the combination of a fireplace heater having a body projecting outwards from the mantel or frame, and a furnace-like portion in the chimney behind the mantel with a fuel receptacle within the cylinder of the heater, which will preserve a supply of unignited coal while the heater is in operation,

and an opening through which the magazine can be fed from above, the magazine extending to this opening. Inasmuch as the heater was old, and the fuel receptacle with the described opening was old when located within an ordinary coal stove, what Thatcher accomplished was merely the advantageous location of the fuel receptacle within the fireplace heater. As the complainant's expert, Mr. Brevoort, states: 'The problem Thatcher had before him was to place the fuel magazine within the Bibb & Auger heater.' It must be conceded that it was not obvious that such a fuel magazine could be advantageously employed in such a heater. Attempts had been made by others to do the same thing without satisfactory result, but Thatcher's organization was a success, and immediately commended itself to the public. But Thatcher's broad claims cannot be sustained. There may have been patentable novelty in the means he employed to adjust the parts in the new organization, but there was none in merely bringing those parts together. They did not perform any new function in the new arrangement. The fuel magazine does just the same work in the new structure it did in the ordinary coal stove. All the other parts of the fireplace heater operate precisely as they would if the ordinary fuel-pot were used instead of the substituted magazine. The parts do not cooperate to produce any result. By their aggregation the new structure contains all the advantages which resided before separately in several structures.' "

It is interesting to note the similarity of the contention of the patentee in the foregoing case with that

urged by counsel for complainant in this case to sustain their theory that the Gilchrist combination produces a new result. The likeness is so striking that there is herewith quoted the following extract:

"Third, that the parts of the combination stated in the claims did not constitute a mere aggregation, but co-operated to produce a new result. This new result, it is claimed, consisted in securing in fireplace heaters a uniform and steady heat, that could be regulated for their own purposes by the occupants of the upper rooms heated by means of furnace registers, at the same time furnishing heat for the room in which it was situated by means of a heater that did not require frequent attention. The result of the contention on these points, as claimed, is that the fireplace heater of the patent, containing a magazine extending to the outer casing of the heater, capable of holding a supply of unignited coal, and feeding the same to the fire, was patentable as a new article of manufacture.

"Mr. Brevoort, the principal expert on behalf of the appellants, states the case on their part in his testimony as follows: 'The problem which Thatcher had before him was to place the magazine of his patent within the Bibb & Augée fireplace heater, or, rather, his invention may be said to have consisted in the conception of the idea of taking out the fuel chamber or pot of the Bibb & Augée device, and substituting therefor a magazine of the kind shown in the Thatcher patent; the execution of which conception, if successful, had for its object to confer upon

the fireplace heater the regularity and steadiness of action which alone could be secured by the use of a magazine standing ready always to automatically feed the fire whenever it may become necessary. Now, it was not at all an obvious thing that this large mass of unignited coal could be put within the comparatively limited compass necessary for the ordinary fireplace heater in place of the incandescent coal contained in the pot or fuel chamber of the Bibb & Auger heater, and still leave a heater which would be successful. Indeed, one of the defendants' witnesses in this case placed a magazine in a fireplace heater, tried it, and abandoned it as useless and as a positive injury, rather than, as future experiments have shown, a great benefit to the structure. Another witness seems to have introduced a magazine into one of his fireplace heaters at about the date of Thatcher's patent. This witness says that he did not think it was important, but says that, had he known anything of its importance, he would have got a patent for it. These two witnesses clearly show that the putting of a magazine into a fireplace heater was not obviously a good method of improving the old Bibb & Auger heater, and that even after a magazine had been introduced, that its utility was not manifest without experiment and careful trial, and this testimony is given by men who apparently were thoroughly skilled in the art, and had had much and long experience in the fireplace heater business. A consideration of the old Nott structure, if it ever existed, as testified to, would have deterred rather than encouraged any one from introducing such a fuel

receptacle as was there shown into a fireplace heater which was required to heat rooms above and below simultaneously. For the reasons above given, I think that it required invention to introduce a magazine extending to the top or outer casing of the stove into a fireplace heater, having a protuberant front for heating the room in which the heater stood, and a furnace-like back for heating the air for the rooms above. Most assuredly, the parts referred to in the first and second claims of the Thatcher patent coact, when in action, in the production of the result desired. The protuberant body heats the lower room. The mantel or frame separates one portion of the heater from the other, so that the protuberant body may perform its function while the furnace-like back may perform its function. The fuel magazine holds the fuel in readiness to supply the fire which is to heat both back and front alike with steadiness and uniformity, the magazine being fed through a hole in the outer casing directly, thus obviating the opening of any doors into the combustion chamber when the fire is to be fed, and the consequent cooling off of the heater by admitting fresh air into the device above the grate. By the bringing together of these parts and their joint action, one with the other, a fireplace heater is formed having advantages over any heater that went before, and which form of heater has gone so extensively and largely into use that it has practically superseded all other forms, as I am informed.' ”

The court then went on to say that the foregoing statement would need to be considered in connection with the well established and admitted facts in respect to the prior art, and after referring to the fact that the fuel magazine when thus transferred was still a fuel magazine, the same as in a stove, performing the same function, the court then used the following language:

"It is true that such a fireplace heater, by reason of the fuel magazine, was a better heater than before, just as the outstanding stove, with its similar fuel magazine, was a better heater than a similar stove without such a fuel magazine. But the improvement in the fireplace heater was the result merely of the single change produced by the introduction of the fuel magazine, but one element in the combination. The new and improved result in the utility of a fireplace heater cannot be said to be due to anything in the combination of the elements which compose it, in any other sense than that it arises from bringing together old and well-known separate elements, which, when thus brought together, operate separately, each in its own old way. *There is no specific quality of the result which cannot be definitely assigned to the independent action of a single element. There is therefore no patentable novelty in the aggregation of the several elements, considered in itself.*

* * * *

The case of *Palmer v. Village of Corning*, 156 U. S. 381, goes into the question as to what consti-

tutes a new and useful result within the meaning of the patent law.

In this case the court had under consideration a combination claim for a grating or covering to a sewer inlet consisting of a grate elevated above the catch basin of a sewer and resting upon a ring or support placed below the top of the basin by means of pins which thus lift up the grating, between which pins spaces were left to allow the water to pass through under the grating. The new result claimed for this combination and of so elevating the grate being, it was claimed, to keep the openings free from debris which would otherwise accumulate on or against it by reason of the leaves and small twigs passing through the spaces beneath the grating; but the court declared the same not to be a patentable combination and referred to the same in the following language:

“The mere use of a ring of iron on which to rest such a grating is obviously nothing more than a mechanical arrangement, which involves no element of invention; and the same is the case with the use of pins or legs for the purpose of holding up a sewer grate. And it is equally clear that the leaving of open spaces between the pins and the elevating of the grate above the ring, thereby giving greater facility for the flow of water, is invention in no sense of the word. But, although no one of these elements of the contrivance involves invention, it is insisted that, taken all together, they constitute a ‘combination,’ and that it is this combination which is covered by the letters patent. If a combination of unpatentable elements, as

such, produces new and useful results, there can be no doubt that the combination is patentable. But there are certain conditions constituting the essential nature of a combination under the patent law, which we think are not met in this case."

The court then quotes with approval from *Hailes v. Van Wormer*, 20 Wall. 353; *Reckendorfer v. Faber*, 92 U. S. 347; *Pickering v. McCullough*, 104 U. S. 310; *Heating Co. v. Burtis*, 121 U. S. 286, 7 Sup. Ct. 1034.

The case is a very instructive one, in that it selects appropriate language from each of the cases therein referred to. The issues in many of these cases bear a striking resemblance to those which the Court now has under consideration.

* * * *

"(3) It is insisted by complainant that a new combination of old things may be patentable, and in support thereof cites the cases of *Loom Co. v. Higgins*, 105 U. S. 580, 26 L. Ed. 1177; *Seymour v. Osbourne*, 11 Wall. 516, 20 L. Ed. 33; 'The Barb Wire Fence Patent,' 143 U. S. 275, 12 Sup. Ct. 443, 36 L. Ed. 154; *Bates v. Coe*, 98 U. S. 31, 25 L. Ed. 68; *Hobbs v. Beach*, 180 U. S. 383, 21 Sup. Ct. 409, 45 L. Ed. 586; *National Hollow Brake-Beam v. Interchangeable Brake Beam*, 106 Fed. 693, 45 C. C. A. 544.

"This rule is well-established, but in the case upon which it relies the combination is new, and the result

of the combination of the old elements is also new. In the case at bar there is no co-operation between the elements; the throats having their sides meeting at an angle. A protected point is disclosed in Hazelton's patents, and is therefore not new. Wedge-shaped throats are disclosed in the Hazelton patent, No. 253,554, and the Scott patent, No. 125,338, is also old. There being no co-operation between these functions, we have the result that each must act in the old way; the joint product being the aggregation of the old result, which, under the rule, is not patentable."

National Machine Corporation v. Benthall Machine Co., 241 Fed. 72, 78.

* * * *

"The effect of this use of old devices in the construction of the McNeal split wood pulley was to strengthen it, and thus add to its durability; but it did not produce a new result or effect."

Dodge Mfg. Co. v. Collins, et al, 106 Fed. 935, 938.

* * * *

"Each element of the claim in suit was old in this very art, and had been used to perform the same function assigned to it in Johnson's present device. This ruffler introduces no new mode of operation, produces ruffles no better and no faster, and does not afford the user (though it may to the manufac-

turer) and advantages over others. The novelty consisted in selecting and rearranging old elements to produce a machine new in form, but old in function, and therefore an old machine."

"It is not invention to combine old devices into a new article without producing any new mode of operation."

Cheapness of the article was urged.

"But the patent is for improvements in a machine which is a combination of mechanical elements adapted to receive and apply motion to the production of a mechanical result, and the patent would as certainly be infringed by a ruffler of which the parts were forged or cast or machined as by one made of stampings. The consideration of cheapness therefore lies in the process, and not in the product."

Griest Mfg. Co. v. Parsons, 125 Fed. 116, 119.

PRIOR ART DEFINED.

"(3) What is prior art is a matter that cannot be determined arbitrarily, nor merely by a restriction of the claim to a special use.

"If the thing is old, and is applied to perform its old functions, it remains in the prior art, and cannot be made novel, in the sense of the patent law, merely because used in new surroundings that do not affect its character or mode of operation."

Robinson v. Tubular Woven Fabric Co., 248 Fed. 526, 542.

In the case of *Knapp et al v. Morss*, 150 U. S. 288, the umbrella was considered as a part of the prior art and operated to defeat the validity of a patent issued for a dress form in which rods or ribs were connected near the top and bottom extremities to braces or stretchers which extended obliquely from the ribs to the standard and were there concentrated and hinged on small movable collars which encircled the standard, by the raising or lowering of which the form would be caused to expand or contract.

In construing and passing upon the question of the validity of patent claims, the courts have always held that the question of invention would depend upon the state of the art at the time of the alleged invention. A review of the quotations and authorities found under the headings,

“Aggregation is not Invention”

“Combined Results may be Aggregation”

“Selected Elements”

“All of the Elements need not be Found in a Single Article”

“Borrowing Elements from Another Art”

“A New Unitary Result” and

“What Constitutes a New Result”

will make it clear that the “state of the prior art” means the state of the art as to each of the elements of a combination claim both separately and in all combinations in which they may be found, and does not mean that the court should consider only similari-

ties of unitary devices embodying the complete combination.

All prior patents are a part of the prior art.

In order to obtain a valid patent, the patentee must come within the terms of Section 4886, U. S. Revised Statutes, which reads as follows:

"Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, not known or used by others in this country, before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, or more than two years prior to his application, and not in public use or on sale in this country for more than two years prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceeding had, obtain a patent therefor."

There can be no foundation for a patent beyond the limitations of the foregoing statute. By application of this statute and the rules of law set forth in the cases under the headings heretofore referred to, all of the patents, publications and pulley block exhibits introduced by the defendant become a part of the prior art and completely destroy the validity of the claims of the patents sued upon.

INVENTIVE QUALITY WOULD NOT SAVE GILCHRIST
PATENT;

As has been indicated under the preceding title, the complainant, Gilchrist, is conclusively presumed to have had knowledge of all that the prior state of art would disclose.

It is undoubtedly true that many a patentee has exercised the inventive faculty and is entitled to credit as a true inventor, and still may have no right to a patent for what he has created.

Unfortunately, the complainant in this case did not go upon the witness stand and the defendant was deprived of the opportunity of examining him for the purpose of determining whether or not he ever exercised the faculties of the true inventor, or had merely appropriated the ideas of another; but it makes little difference which may be the true state of facts, as in either case, he would not be the first inventor and would therefore have no right to a patent.

The law on this subject is well set forth by the court in the case of *Duer v. Corbin Cabinet Lock Co.*, 149 U. S. 216. In the third paragraph from the end of the decision, we find the following language:

"All that he claims as invention is found in one or more of the prior patents. * * *

"In view of the fact that Mr. Orum had no actual knowledge of the Gory patent, he may rightfully claim the quality of invention in the conception of his own device; but as he is deemed, in a legal point

of view, to have had this and all other prior patents before him, his title to invention rests upon modifications of these too trivial to be the subject of serious consideration. His 'radically new idea of making the mortise as deep as the width of the projecting selvedge, and of cutting out the selvedge at its ends,' as claimed by his counsel, was such as would have occurred at once to an ordinarily intelligent mechanic, who had the previous devices before him. * * * * "

At the time Gilchrist conceived the idea of making his auto-lubricating block, cast sides had been made in all shapes and designs and had become popular with the public. It certainly would not have required the exercise of the inventive faculty to have changed the Morgan block side to a side cast in one integral piece, even though a block side with interior oil chamber cast in one side had not previously been known. But for the purpose of this case Gilchrist is conclusively presumed to have had before him not only the Morgan block, but also the Ludford, Butters, Gilley, and Labadie blocks, as well as all others of the prior art.

DEDICATION TO AND RIGHTS OF THE PUBLIC.

It has heretofore been pointed out that the claims measure the invention and cannot be enlarged by the specifications and that each element of a claim is considered as an essential part thereof. It is also well established that all claims must be construed in view of the prior state of the art.

With these well established rules in mind it becomes interesting to examine the claims of the Gilchrist patents with the view of trying to find something in them upon which a valid patent could be based.

In making this examination the following rules should be constantly kept in mind:

"While the patentee may have been unfortunate in the language he has chosen to express his actual invention, and may have been entitled to a broader claim, we are not at liberty, without running counter to the entire current of authority in this court, to construe such claims to include more than the language fairly imports. Nothing is better settled in the law of patents than that the patentee may claim the whole, or only a part of his invention, and that if he only describes and claims a part, he is presumed to have abandoned the residue to the public. The object of the patent law in requiring the patentee to 'particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery,' is not only to secure to him all to which he is entitled, but to appraise the public of what is still open to them. The claim is the measure of his right to relief, and while the specification may be referred to to limit the claim, it can never be made available to expand it."

McClain v. Ortmeier, 141 U. S. 419, 423.

* * * *

"Now, while this semi-circular connecting piece may be an immaterial feature of the Wright Inven-

tion and the purpose for which it is employed accomplished, though less perfectly, by the extension of the guiding cylinder in the manner indicated in defendant's device, yet the patentee, having described it in the specification and declared it to be a special feature of his invention and having made it an element of these two claims, is not now at liberty to say that it is immaterial or that a device which dispenses with it is an infringement, though it accomplishes the same purpose in perhaps an equally effective manner."

Wright v. Yuengling, 155 U. S. 47, 52; 39 Law. Ed. 64.

Inasmuch as all which has not been claimed is dedicated to the public, there are hereinafter set forth several claims which could have been drawn upon the device described, had the complainant been the first inventor of a pulley block.

None of the claims hereinafter set forth embody the same combination which is set forth in any of the claims of the Gilchrist patent, and they could have been valid claims had he been the first inventor of a pulley block. Numerous other claims could also have been made, had the complainant Gilchrist been the first inventor of a pulley block.

An examination of the claims hereinafter set forth, all of which must be considered as dedicated to the public, shows to what narrow limits the complainant's patent would have been confined without any consideration whatever of the prior state of the art. When the prior state of the art is also taken into

consideration, it will be found that there was no task left for the complainant to solve, and, by reason thereof, that his claims cannot be the basis of a valid patent.

CLAIM A.

A pulley block consisting of the combination of sides, a bearing-pin terminally mounted therein, and a sheave journaled on the pin.

The above claim defines the combination of three elements essential to every pulley block which any tyro in the art knows to be old, and which the rule of law confirms to be old.

CLAIM B.

A pulley block consisting of the combination of sides, a bearing pin terminally mounted therein, and a sheave journaled between the sides on the pin.

CLAIM C.

A pulley block consisting of the combination with sides, a bearing pin terminally mounted therein, and a sheave journaled on the pin between the sides, of an oil chamber communicating with the bearings for the sheave upon the pin.

CLAIM D.

A pulley block consisting of the combination with sides, a bearing pin terminally mounted therein, and a sheave journaled on the pin between the sides, of an interior oil chamber in one of the sides communicating with the bearings for the sheave upon the pin.

CLAIM E.

A pulley block consisting of the combination with sides, a bearing pin terminally mounted therein, and a sheave journaled on the pin between the sides, of an oil chamber communicating through an axial opening provided in the pin with the bearings for the sheave upon the pin.

CLAIM F.

A pulley block consisting of the combination with sides, a bearing pin terminally mounted therein, and a sheave journaled on the pin between the sides, of an oil chamber communicating through an axial opening provided in the pin with the bearing for the sheave upon the pin, said axial opening extending through the side wall of the pin.

CLAIM G.

A pulley block consisting of the combination with sides, a bearing pin terminally mounted therein, and a sheave journaled on the pin between the sides, of an interior oil chamber in one of the sides communicating with the bearings for the sheave upon the pin, having an inlet adjacent to the top of the block.

Claim 1 of patent No. 977,613 is merely an aggregation of the several limitations of above claims E, F and G into one enumeration, without any new result.

Add to the foregoing claims all the elements, combinations and modes of operation which are disclosed

by defendant's exhibits in this case and it will be found that the Gilchrist claims do not disclose a single new element, do not disclose any new combination of elements and do not disclose any new mode of operation. On the contrary, each of the elements of the Gilchrist claims can be found, both separately and in combinations, performing the same function which it performs in the Gilchrist claims.

SCOPE OF INVENTION NOT DEFINED.

As to patent No. 977,613, the complainant's claim to invention was finally narrowed down to the single conception of embodying in his device a block side containing an oil chamber cast in one integral piece. But this one idea cannot be found in either the language of the claims or the specifications. On the contrary, complainant has specifically stated that "it is the object of this invention to provide a pulley which will contain a considerable quantity of lubricant, and feed the same, automatically and slowly, upon the bearing of the pin" (Specification, page 1, lines 24-28), and, "another object of the invention is to provide a pulley, the bearing pin of which is adequately protected against dirt and dust" (Specifications, page 1, lines 33-35).

"Some persons seem to suppose that a claim in a patent is like a nose of wax which may be turned and twisted in any direction, by merely referring to the specification, so as to make it include something more than, or something different from what its words express. The claim is a statutory requirement,

prescribed for the very purpose of making the patentee define precisely what his invention is; and it is unjust to the public, as well as an evasion of the law, to construe it in a manner different from the plain import of its terms."

White v. Dunbar, 119 U. S. 51.

Complainant's patent describes his invention as that of "a new Pulley-Block," which would be a new and useful machine, the newness of which, under the specification and claims, would consist in its being a pulley block or machine provided with a considerable quantity of lubricant which would feed automatically and slowly upon the bearing pin of the pulley and the bearing pin of which would be adequately protected against dirt and dust.

The evidence is overwhelming to show that he made no such invention. The conception of the broad idea of self-lubrication was old, and the conception of the broad idea of adequately protecting the bearing pin against dirt and dust was also old, and within the language above quoted, the patentee cannot now treat his claims as a nose of wax which may be turned and twisted in any direction by merely referring to the specification, or by changing it to what may now be found necessary in order to give it validity.

As is very well stated in the quotation hereinafter given, the rights of the public are involved:

"(7) The evidence in this case clearly shows that Benthall was persistent in his contention that in order

to properly stem peanuts it was necessary that the sides of the teeth should 'meet at an acute angle,' and there is nothing to indicate that it was his purpose to carry his claim beyond what he contended at the time. Where one seeks a patent by which he is to secure a monopoly of the use of the machine proposed to be patented, such applicant is required to describe specifically and with great care the nature of his invention. Otherwise the patent could be construed from time to time by enlarging its scope so as to meet any exigencies that might arise. One who seeks a patent must necessarily do so with the understanding that he is dealing with the public at large. In other words, he is entering a realm wherein the rights of the public are involved, and it is upon this theory that he is required to clearly define the scope of his invention."

National Machine Corporation v. Benthall Machine Co., 241 Fed. 82, 87.

The cases of *White v. Dunbar*, 119 U. S. 47, 7 Sup. Ct. 72, 30, L. Ed. 303; *Evans v. Eaton*, 7 Wheat. 365, 5 L. Ed. 472; *McClain v. Ortmyer*, 141 U. S. 419; *Imperial Cap & Machine Co. v. Crown Cork & Seal Co.*, 139 Fed. 312, and *Tate Manufacturing Co. v. Baltimore & Ohio Railroad Co.*, 229 Fed. 141, are reviewed in the above case.

Complainant has not disclosed any new mode of operation, therefore cannot be the inventor of a new machine. He has not made any claim to an improvement by making the side in an integral casting. He

cannot claim the broad principal of lubrication and protection of the bearing pin against dust, and has not pointed out wherein he has made any improvement over the prior art. Within the plain language of the statute R. S., Sec. 4888, and the rules of law as laid down in the foregoing cases complainant has not properly defined the scope of his patented invention and his claims must be declared invalid as he cannot call upon the court to reconstruct his claims for him.

ESTOPPEL BY LACHES.

In referring to the question of estoppel by laches, the Supreme Court of the United States in the case of *Gallagher v. Cadwell*, 145 U. S. 638, 36 L. Ed. 738, 740, uses the following language:

“The cases are many in which this defense has been invoked and considered. It is true, that by reason of their differences of fact no one case becomes an exact precedent for another, yet a uniform principle pervades them all. They proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned; and that because of the change in conditions or relations during this period of delay, it would be an injustice to the latter to permit him to now assert them.”

“The defense of laches is not tested by time alone. Lapse of time may be well explained; but, on the other hand, even a comparatively short time may constitute laches, when the conduct of the slothful is such as to induce others to expend money and take the risks of enterprise.”

A. R. Mosler & Co. v. Lurie, 200 Fed. Rep. 433.

The question of estoppel by laches is one which rests within the sound discretion of the court, and there are so many cases in which this question has been involved, each of which turns on its particular state of facts, that it would serve little purpose to cite these cases to the court.

However, the case of Vacuum Cleaner Co. v. Innovation Electric Co. Inc., 234 Fed. 942, has this question for consideration under circumstances which are so similar to the circumstances of the present case that I feel justified in calling this case to the Court's attention as a precedent or rule which might be applied here. Beginning with paragraph (3) on page 947 and continuing to page 949, it will be found that the circumstances were very similar to those which the Court now has to deal with.

In the foregoing case a letter was sent by the plaintiff November 1, 1910, notifying the defendant of its infringement of the patent. On November 12, 1910, defendant's attorney replied, stating in effect that he advised his client that it was not infringing any of the claims of the patent. On November 14,

plaintiff's counsel asked for detailed information. On November 17 the requested information was given. On May 26, 1911, plaintiff's counsel was written to again by counsel for defendant calling attention to the previous letters. In April, 1914, the president of the defendant company called upon the managing director of the plaintiff concerning threatening letters which plaintiff had sent to defendant's customers, and requested that he tell whether or not he considered that defendant infringed; he was answered by the manager that he would give the matter to their attorneys and have them write. On April 18, 1914, defendant received a letter from the plaintiff stating it would be some days before they could write the defendant anything definite on account of plaintiff's lawyers being busy in court. Nothing further was heard from the plaintiff until October 11, 1915, when defendant received a letter directing its attention to the infringement and stating that plaintiff would expect an accounting.

Throughout this period defendant was showing its machines at public exhibitions and was notoriously carrying on its business. For some reason plaintiff concluded not to sue defendant until after September 30, 1915. Under this state of facts, although the court found that the patent had been infringed, no accounting was allowed against the defendant.

In the matter now before the Court, there is the additional circumstance which was undisputed by any of complainant's witnesses, that the complainant had stated that he was going to wait until it was worth

while before he brought an infringement suit against the defendant. (R. 54, 65 to 70).

EXAMINATION AND REVIEW OF APPELLANT'S POINTS AND AUTHORITY.

On page 9 of appellant's brief it is stated that oral recollections cannot prevail against reasonable inferences from conduct, and in substantiation of this proposition there is cited the case of *Atlantic Works v. Brady*, 107 U. S. 192. Appellee will gladly accept the rules for construction as laid down in the case of *Atlantic Works v. Brady* and will be glad to have the court bear in mind the natural tendency which the patentee in this case has displayed, "*to watch the advancing wave of improvement and gather its foam in the form of patented monopolies,*" with the hope that he may thereby "*lay a heavy tax*" upon the logging supply industry of the Pacific Northwest. The fact that appellant desired to gather in some of this "foam" is clearly indicated from the testimony of Robert Gillespie to the effect that Gilchrist had not taken up with Mallory the alleged infringement of his patent, and intended to wait until Mallory had put out enough blocks to make it worth while to bring suit against him. (R. 54).

This testimony with the correspondence which passed between Gilchrist and Mallory (R. 65-70), taken in conjunction with the broad and unwarranted claims by which Gilchrist attempted to appropriate to himself not merely an improvement, but a pretended new pulley block, would make it entirely proper for the

Court to draw reasonable inferences of the patentee's attempt "to gather where he had not sown" and would justify the Court in adjudging the appellant as estopped from making any claim for damages or for an accounting even if it should find invention.

As to the question of design being important to appellee, I feel that it will be but necessary to call the Court's attention to the exhibits in this case to show that it apparently became very important to the appellant.

Appellant had nothing but a cumbersome, one sided block until after appellee came out with his sky line auto lubricating block in 1914 with the reservoir on each side and following the general design of his previous block, after which, as is shown by the exhibits in this case, appellant changed his original construction, did away with the reservoir covering the entire side of the block and adopted a design more in keeping with that put on the market by the appellee.

The statement quoted from the decision of Judge Blodget in the case of Manufacturing Company v. Rathbone, 26 Fed. 262, is a mere comment of the court as to what is a common thing and can in no way be considered as the judicial interpretation of any kind of a right. There is nothing in this case which in any particular throws any light upon the Gilchrist-Mallory case. There has been no subsequent judicial comment concerning this case other than

a mere reference to the case by the same Judge in an opinion rendered in an action against another defendant involving the infringement of the same patent, and reference to it.

In the case of *Covert v. Covert*, 106 Fed. 187, at page 183, in which last mentioned case the theory of the tendency of a person to belittle the device alleged to have been appropriated was not allowed to prevent the court from declaring the patent under consideration void by reason of public use more than two years prior to the application for the patent.

The quotation from the opinion of Justice Swayne in the case of *Rubber Co. v. Goodyear*, 9 Wall. 793, is likewise a mere statement concerning certain human tendencies which throws no light upon the present controversy. The statement should be considered in conjunction with quotations from Justice Bradley in the case of *Atlantic Works v. Brady*, 107 U. S. 192 and quoted on page of this brief.

The utility of the Gilchrist block is not denied and there is, therefore, no occasion of comment on the quotation from *Lucas v. Miller*, 2 R. P. C., 155-160.

The quotation from the opinion of Judge Buffington in the case of *Goss Printing Press Co. v. Scott*, 108 Fed. 253-258, is of little value in connection with the consideration of this case by reason of the fact that the question of utility has not been questioned. However, this case is of some value in pointing out the distinction between combination and aggregation.

As to one of patents under consideration, the Court used the following language, beginning near the bottom of page 259:

“Granted the change consisted in banking one press upon another, yet the two, when so combined, and in their new relation, so co-acted as to dispense with the angle-bars, with a web-deflected course, and made possible a straight-line duplex press. A single straight-line press in itself was no novelty, so far as the straight-line printing of an individual web is concerned; but, when the product of two such presses were united, it was only through angle-bar agency. Firm’s device, by placing the two in new relations, eliminated the angle-bar, did away with the tangent-turning webs, and thus secured valuable results. *The test in such cases is not whether duplication exists, but whether duplication produces, not mere duplication of product or function, but a new unitary, additional result, and not the mere aggregate of prior, separate mechanism.*

By applying this same test to the other patents under consideration in this particular case, the Court decided each of the other patents invalid because it found as to the other patents that while there were new mechanical modifications and changes and the bringing together of parts of the prior art in a different manner from which they had previously been brought together, there was no such co-action of parts in a unitary device as to sustain the validity of the patent.

The quotation from the decision of Judge Coxe in the case of *Auto Vacuum Freezer Co. v. Sexton Co.*, 239 Fed. 898-901, is inapplicable to the present controversy in that the Gilchrist device has not inaugurated any new industry and is in no sense a pioneer patent.

This case is cited in the case of *Homer Brooke Glass Co. v. Hartford Co.*, 262 Fed. 427, where at page 430, near the bottom of the page, the Court uses the following language:

"It is always necessary, even after granting the widest range of equivalents, to find as a matter of fact that what the defendant has done is the invention of the plaintiff 'substantially as described.' The range of decision, the limits imposed by law on the triers of the facts, are indicated by the word 'substantially'; an infringer may easily substantially imitate a big thing—i. e., a deeply rooted and widespread inventive thought; whereas, without 'Chinese copying,' imitation of a little thing is oftentimes difficult."

"(2) But, whether the invention is large or small, primary or trivial, it remains true that, when a claim is clear and distinct, the patentee cannot go beyond the words thereof for the purpose of establishing infringement; the specification may be referred to for the purpose of limiting, but not of expanding, a claim, and the range of equivalents is measured by what is described and claimed." (Citing several cases).

The attempt of the appellant on page 12 of this brief to have the Court believe that Hirshbuhl might be talking about a Gilchrist block side is wholly unwarranted in face of Hirshbuhls' positive testimony that he had never seen a Gilchrist block and thought they were designing the first oil reservoir block and that he had reference to block side 106, which was then in evidence in this case, being one of the Mal-lory block sides, and in view of the further fact that the Gilchrist block as shown by exhibits did not have these ribs. (R. 95-96).

In the case of Victor Talking Machine Co. v. Cheney Talking Machine Co., 275 Fed. 444-447, quoted from at page 14 in appellants brief, both plaintiff and defendant consented to dismissal without prejudice and upon the express condition that the testimony taken up to the time of dismissal might thereafter be used by either party. Certainly the defendant in this case was charged with notice of the fact that plaintiff might thereafter prosecute his claim for infringement.

In the case of Columbia Graphophone Company v. Searchlight Horn Co., 236 Fed. 135, it was shown that the complainant was without funds to prosecute the infringement cases at an earlier date, and defendant's position was in no way changed. He had merely sold horns on commission which would yield him a just profit, even after paying a royalty thereon.

In the case of *Rajah Auto Supply Co. v. Belvidere Screw & Machine Co.*, 275 Fed. 761, appellant has quoted from page 764.

In this case plaintiff had prosecuted to success his patent infringement case against one including the defendant, of the decision and warning them against further infringement, to which the defendants answered that they had discontinued the manufacture of the article as previously agreed to by conversations. The matter was next taken up concerning the manufacture of another design of spark plug, which they claimed to be manufactured under another patent, after which a second warning letter was sent to them and they replied that they had discontinued the making of that article shortly after hearing from them. The only other evidence of estoppel or latches is that defendant's article, which it is now claimed infringes, was claimed to have gone in extensive use, but it was not clearly shown that the plug which they complained of was in extensive use or that the production covered such a period of time as urged and it was held that the defendant had failed to maintain his defense in this respect.

The case of *McLean v. Fleming*, 96 U. S. 245, was a trademark case, in which it was shown that the plaintiff had been selling pills under the name used and in boxes or packages of a distinctive label or wrapper for a period of forty-five years. The defendant put out pills under the same name, adopting labels and wrappers, resembling those of complainant. He was

notified to desist from so putting his goods upon the market, and while there was considerable delay after notice before complainant brought his suit, the court found as a matter of fact that the defendant was deliberately attempting to palm off his goods as the goods of the complainant and consequently granted an injunction against such use of name and labels. However, by reason of the delay in bringing suit after knowledge of the use of the name by the defendant, the court refused to allow the plaintiff an accounting. While this is a case which has been cited numerous times to the effect that an injunction might sometimes be granted, even when the facts are such as to cause the court to refuse an accounting, it certainly does not fit the facts as they exist in this controversy.

In the case of *Menendez v. Holt*, 128 U. S. 514, 32 L. Ed. 526 in the next to the last paragraph of the opinion after reciting that the right to injunction will not usually be lost by delay, although accounting may, the court uses the following language:

“At the same time, as it is in the exercise of discretionary jurisdiction that the doctrine of reasonable diligence is applied, and those who seek equity must do it, the court might hesitate as to the measure of relief, where the use, by others, for a long period, under assumed permission of the owner, had largely enhanced the reputation of a particular brand.”

Compare this statement of the court with the actions of Gilchrist in deliberately planning to allow the

defendant, Mallory, and other manufacturers to proceed with the manufacture and sale of the articles to such an extent as to make it worth while for him to bring an action for infringement and accounting, knowing that the defendant, Mallory, would be able to create a market for this particular device, which the complainant, Gilchirst, might not have been able to have created.

In the case of *Beattie Mfg. Co. v. Smith*, 275 Fed. 164, at page 172, the court merely goes to the extent of saying: "Mere latches, unaccompanied by circumstances which amount to an equitable estoppel, will not shut out a party from all relief in a court of equity."

The case of *Willard v. Union Tool Co.*, 253 Fed. 48, from which counsel has selected a quotation from page 53, pertains to the construction of a patent covering a combination of certain features of a boring device for holding the same in position for a designated purpose, in which device slips or wedges were removed from the opening to allow the substitution of the drive bushing or nut and were placed in position for the purpose of holding the pipe in a desired position. The removing or placing of these wedges or slips was performed by hand and when removed they were entirely separate from the machine and the court held that there was no true combination in that a combination in mechanism must consist of distinct mechanical parts having some relation to each other and each having some function in the organism.

The court held that the elements were not contained in a unitary structure, that the device for holding the

pipe in position was a detached instrument which was no part of the machine or manufactures and that the manuel use of a tool or non-attachable device could not be made an element of a combination claim. The patent as to such claim was determined to be invalid.

This case is cited in the case of VanDorn Iron Works Co. v. Matthews Bros. Co., 260 Fed. 400 at page 406, being a decision of the Circuit Court of Appeals for the Sixth Circuit, in which case the court had under consideration patents covering mail boxes of the type now in general use, consisting of U shaped angle irons which served as corners to which the sides of the sheet metal were riveted, said angle irons being extended down so as to form legs.

The court held that the use of angle irons was old in the prior art and that inasmuch as mail boxes had previously been made with receptacles for letters and papers which were placed upon bases or legs, the mere employment of angle irons in continuous pieces forming corners and also legs to the box and the particular formation of these boxes constituted nothing further than mechanical adaption of so many materials and methods and did not rise to the dignity of invention.

Pelton Water Wheel Co. v. Doble, 190 Fed. 760.

When we come to examine this case, we find that the court had under consideration a combination patent for controlling the water supply to a water wheel. The patentee had combined a curved nozzle with a

pivot jet in line with the line of discharge to the supply pipe, effecting a double curve in the pipe or nozzle at this point so as to do away with the tendency to push the nozzle upward by the water going through the curve. The curve in the pipe or nozzle was necessary in order to enable the placing of the pivot jet in the nozzle so that the rear of the pivot could extend through the side of the nozzle, and thereby be controlled.

The trouble with placing a pivot in previous nozzles had been that the curve in the pipe or nozzle acted as a resistance to the water on one side, and thereby had a tendency to force the nozzle in a position opposite that in which it was curved. Complainant overcame this difficulty by a double curve of the pipe or nozzle, the nozzle first being curved in one direction and then an equal curve in the opposite direction, so that the tendency to push the nozzle in one direction would be overcome by the tendency of the second curve to push the nozzle in the other direction. Defendant contended that there was nothing new, by reason of the fact that water to two turbine water wheels by means of one pipe conducting the water to within a short distance of the wheels, then separating into two pipes, one of which would curve to one wheel, and the other to the other wheel, whereby the tendency to push the pipe in one direction, by reason of the curve to one wheel, would be overcome by the tendency to push the pipe in the other direction by reason of the opposite curve in the pipe to the other wheel.

The court said that while it was probably true that there was such a tendency, nevertheless the same

was not known, and it was not constructed for the purpose of producing such a result, but was merely an incidental result of the dividing of the pipe, said device being for no other purpose than that of supplying water to two different wheels. It very properly held that same could not be construed as an anticipation to the pivot jet nozzle with reverse curves.

On page 766, and as a part of the same paragraph which complainant's counsel have quoted, we find that the following language was used by the court: "In order to be patentable, a combination of elements must in their co-relation produce a different force, or effect, or result, from the sum of that which is produced by their separate parts," citing *Reckendorfer v. Faber*, 92 U. S. 437.

The case of *Burdett-Round Tree Mfg Co. v. Standard Plunger Elevator Co.*, 196 Fed., 43, pertains to the question of the entry of the human element in a combination claim. In this case the court had under consideration an improved electrical elevator, whereby a signal system for electric elevators was such as to enable a single person at the motor to control the movements of the elevator, while the combination claim covered a hoisting mechanism, means for controlling the same, means for operating and to start the car and to rest it automatically at any predetermined landing with a push button for each floor at which the car is to stop, a circuit for each push button and a signal actuated by the operator of each push button for signifying in advance of the starting of the car

the floors at which the car was desired to stop. While the human element was necessary to complete the operation of the combination based upon the signal so given, it was held that this would not defeat the combination claim as all of the elements pertained to bringing about the desired result of allowing the elevator to be operated and controlled from a given point known as one point control or at the motor.

In the case of *International Mausoleum Co. v. Seivert et al*, 213 Fed. 225, the court had under consideration upon a demurrer the validity of a patent claim covering a burial crypt, comprising a structure with a reception hallway series of catacombs erected therein and space from the walls thereof whereby an air passage is formed, said catacombs being provided with valve control ports at the rear end, which communicate with said air passage, said air passage being provided with an outlet at or near the top of the structure, also valve control ports at the front end of the catacombs, through which the air may be exhausted therefrom after the same are sealed. The question decided by the court was that on demurrer it could not be said that the claim did not cover a manufacture under the meaning of the patent law. There is certainly nothing in this case which can throw any light on the machine patent under consideration.

"In the case of *National Cash Register Co. v. American Cash Register Co.*, 53 Fed. 367 the court had under consideration the following claim; In a cash

registering apparatus a series of keys to designate certain amounts, combined with a drawer, the drawer holder D immediately connected with said keys, and the spring to throw the drawer open when released by the drawer holder, substantially as described."

The patentee was the first one to construct a cash register device in which the drawer would be opened by the operation of the keys and the court held the same to be a patentable combination.

Near the bottom of page 371, in commenting on the case of *Pickering v. McCullough*, 104 U. S., 310, the court uses the following language:

"If, instead of an extract, the whole opinion be read, in connection with the authorities which are cited in it, it may be readily perceived that the substance of the doctrine intended to be affirmed is that *a combination*, to be patentable, must produce a new and useful result, as the product of the combination, and not a mere aggregate of several results, each the complete result of one of the combined elements."

In the case of *Ohmer Fare Register Co. v. Ohmer et al*, 238 Fed 182:

The court had under consideration three patents. The first related to operating, or actuating mechanism, for a fare indicator. The second patent related to the registering device whereby the month, the day, the different trips, the number of the register and the fares collected were all properly recorded, being the first mechanism in which this result had been obtained.

The third patent related solely to means for identifying the person taking the statement from the register, the identifying means being a key bearing a distinct mark, as for instance, the conductor's number.

The device of the patent is such that when the key is out of the machine the operating parts are held by notches so that they can not be operated, and the insertion of the key releases the notches, unlocks the printing mechanism, and places the identifying number on the key in alignment with the figures or characters of the fare or other recording wheels, so that the impression of the figures or device on the identifying key is recorded therewith.

The matter of recording an identifying number was also new in this art. The first patent was held void for want of invention, and the second two were sustained.

Beginning with paragraph 2, page 186, of reported case.

After indicating that the exact arrangement of the devices was not found in the prior art, the court used the following language:

"We are cited to no reference in the prior art, fully anticipating the patent in suit. But we are considering the scope of invention, not anticipation; and in such inquiry the question is one of fact, taking into account the entire prior art, whether the advance made in the given case amounts to invention or only mechanical skill. *Herman v. Youngstown Co.* (C. C. A. 6) 191 Fed. 579, 112 C. C. A. 185; *Ferro Concrete Co. v. Con-*

crete Steel Co. (C. C. A. 6) 206 Fed. 666, 668, 124 C. C. A. 466; Ft. Pitt Co. v. I. & M. Mfg. Co. (C. C. A. 6) 232 Fed. 871, 875, 147 C. C. A. 65. All elements of the prior art have a bearing upon the question of invention; it being unnecessary to a finding of lack of invention that every element be found in one embodiment. Zimmerman v. Machinery Co. (C. C. A. 6) 232 Fed. 866, 868, 147 C. C. A. 60; Keene v. New Idea Spreader Co. (C. C. A. 6) 231 Fed. 701, 708, 145 C. C. A. 587; Ft. Pitt Co. v. I. & M. Ffg. Co. (C. C. A. 6) *supra*, 232 Fed. at page 874, 147 C. C. A. 65.

“Defendants contend that plaintiff’s patent is confined to means for operating the sliding mechanism disclosed. But, passing this contention, and assuming that the narrow claims may involve invention, we are disposed to think, upon a consideration of the entire prior art adduced, that the claims in suit, if construed broadly enough to cover defendants’ mechanism, would be void for lack of invention. In reaching this conclusion we have not overlooked the consideration of commercial success. But, while public favor is to be considered where invention is in doubt, yet not only is it not otherwise important (Cincinnati Traction Co. v. Pope (C. C. A. 6) 210 Fed. 443, 449, 127 C. C. A. 175), but in the instant case the record does not show that the commercial success of plaintiff’s device is appreciably contributed to by the mechanism of the claims in suit. For all that appears in the record, the success may be due largely, if not entirely, to other features of invention or construction, including the devices of the other patents in suit.”

As a new element was introduced in each of the second and third patents, the court held each patent valid, adhering, however, to the rule as therein expressed, in deciding the validity of these claims, namely: That the elements so co-act that as a consequence of their union a new and useful result, and not a mere aggregation of several results follows:

That this case can not be considered as an authority in sustaining appellant's contentions in this case is indicated by the treatment which this case has had in frequent considerations by the court. The case is cited in the case of *Lemley v. Dobson-Evans Co.*, 243 Fed. 391, page 398, in substantiation of the proposition that the mere bringing together of old elements, or their equivalents, where each works out its own results, so as to only give the sum of the results of the elements instead of a product, which amounts to a new result, is nothing more than the expected ability of the skilled artisan and is not invention.

In the case of *Lemley v. Dobson-Evans Co. supra*, the court had under consideration U. S. Patent No. 819,461, issued May 1, 1906, to Schade for an improvement in a loose leaf binder which is illustrated on page 393 of the report. The binder being formed by a continuous wire hingedly connected to each side of a resilient arch shaped metal in the back of the binder, having off-set in the wire passing beyond the middle of the binder and then returning and forming the hooks, or rings, such as is common in loose leaf binders. At the time of Schade's invention loose leaf binders formed by two plates hinged together, and also

hingedly connected to the edge of an arch-shaped resilient back, and to which half rings were attached which would be held either closed or open by the spring effect of the resilient back, were upon the market. Blackmer and Robson had also invented a loose leaf binder by utilizing a continuous wire in which there was a slight off-set in the portion thereof which ran laterally with the binder, and between the back of the binder and a springlike piece of metal, the ends of this wire being formed in half eyelets, or rings, so as to be engaged or disengaged and held in place by the spring effect of the binder in the back and the strip of metal upon the off-set in the wire.

The court held that the state of the prior art was such that while no one of the prior devices would act as a complete anticipation of the Schade patent, the prior devices or their equivalents, selected from the various previous devices were sufficient to defeat the validity of the Schade patent.

Certainly the devices used in connection with these loose leaf binders as described and illustrated in this case, are no closer equivalent of each other than are the Morgan, Labadie, Ludford & Butters oil reservoirs provided in the side of the block, equivalents of the Gilchrist block side. shown on pages 154, 104, 44 and 164, Vol. 2, Transcript of Record Exhibits.

In view of these oil chambers which Gilchrist has conclusively presumed to have had before him at the time of applying for his patent, certainly no inventive genius could be displayed in the providing of a block side containing an interior oil reservoir integral there-

with. Likewise when we trace the function of each element of the Gilchrist claims we find not only the equivalent of the element but almost the exact duplicate of the element in the prior art performing exactly the same function. The Gilchrist device therefore discloses no new co-action of elements and no new results.

The case of Fare Register Co. v. Ohmer Co. *supra*, was next considered by the Circuit Court of Appeals of the Sixth Circuit in the case of General Manifold & Printing Co. v. Simple Account Sales Book Co. 246 Fed. 125, in which the case was again cited by the court as authority for the following proposition.

“From neither point of view did he do more than to take an existing combination and substitute for one element thereof a known equivalent. This is not invention.”

The case of Ohmer v. Ohmer, 238 Fed. 182, is again cited by the Circuit Court of Appeals of the Sixth Circuit in the case of J. H. Day Co. v. Mountain City Mill Co., 264 Fed. 963, 966, where the court had under consideration the question of invention in connection with a cracker cutting machine. Beginning with the bottom of page 965 the court uses the following language:

“The dominant fact is that, when Ward entered the field, Perky had already applied to the biscuit-cutting art the idea of moving cutters and material to be cut in unison, had reduced the idea to practice, and had dis-

closed to the public operative mechanism therefor. It clearly would not have been invention to apply to ordinary cracker cutting Perky's method of vertically operating knives carried by bolts moving in unison with the feed of the biscuit material. It seems equally clear that there was no invention in substituting for Perk's means of effecting unison of movement the means disclosed by Hovey for effecting such unison in an art containing so much analogy as that of cutting a sheet of plastic clay."

Citing *Ohmer v. Ohmer*, *supra*, with several other cases.

In thus tracing the history of the case of *Willard v. Union Tool Co.*, *supra*, and the various cases included in the quotation therefrom on pages 18 and 19 of appellant's brief, we find that it was not the intention of the courts to change the rules of law concerning claims for combinations or improvements in mechanical devices requiring a new mode of operation or a new co-action of the elements resulting in a new result which must be something more than a mere aggregation, or sum, of their individual functions before such combination can be said to have raised to the dignity of invention.

It is true that here and there we find decisions where the court has used unguarded language which might imply that inventions could be obtained by reason of the utility or superiority of the device without giving the intention which the law requires should be given as a test for patentable invention. However, a close ex-

amination of these cases and their history usually discloses that the error of the court has been an error as to the facts involved rather than an error as to the rule of law applicable thereto.

The cases in which the courts have been apparently unduly influenced by the question of the utility of an article or its commercial success without properly guarding their decisions concerning the application of the rules which should be applied for testing a patentable invention have been aptly classified as cases lying within the "twilight zone." Once in a while one of these cases finds its way to the United States Supreme Court and then it must stand a test of invention other than that based upon utility or commercial success, or the patent will fail.

The cases which counsel for appellant is relying upon in this connection are the "twilight zone" cases.

We find, for instance, that the case of *Railroad Supply Co. v. Hart Steel Co.*, 222 Fed. 261, is one of the cases in which the court relied on the decisions just referred to. This case pertained to a patent for corrugated rail plates, or seats, and was decided by the Circuit Court of Appeals for the Seventh Judicial District.

The court reversed the decree of the District Court, holding the patent void and directed an order for an accounting on the claim of the first patent and to enter an injunction and order and accounting on claims of second and third patents. These same patents were again under consideration by the Circuit Court of

Appeals for the Sixth Judicial Circuit in the case of Railroad Supply Company v. Elyria Iron & Steel Co., 213 Fed., 789, and the Circuit Court of Appeals in this case came to the conclusion that the patents were void for lack of invention in view of the prior art. The case was taken to the Supreme Court of the United States on *writ of certiorari* and affirmed by the United States Supreme Court May 21, 1917, 244 U. S. 294, 61 Law Ed., page 1136.

The various cases cited pro and con by counsel in this case would be sufficient to require a long judicial vacation from work on the bench if the Court should thoroughly read and analyze each of these cases, but on page 1141 of Vol. 61, L. Ed. under the head, "*All the Claims in Suit are for Mechanical Aggregations and not for Patentable Combinations*" will be found a long list of prominent cases, which have been considered over again by the court, and are ample authority for holding that no such device as the Gilchrist block can be considered as a true combination which will pass the test of inventive genius in view of the prior state of the art.

By next tracing the case of New York Scaffolding Co. v. Whitney, 224 Fed. 452, which is found twice on page 19 of appellant's brief, we find a history of the same to be as follows:

The court had under consideration United States Patent No. 959,008, where an improved scaffolding supporting means issued May 24, 1910, to E. H. Hen-

derson. This scaffolding device consisted of a plurality of U shaped bars arranged in pairs, a cross-beam or put-log laid in and extending between each pair of said U shaped bars, a floor laid down upon said cross-beams, a drum rotatably supported between the upward extending side members of each of said U shaped bars and means of controlling the rotation of said drum. This resulted in a readily collapsable and easily adjustable scaffolding so that it could be easily moved from place to place by means of the drums being in the U shaped angle irons at each end of the put-log, the crank or operating device was not in the way of the operator upon the platform. The District Court had held this patent invalid for want of invention in view of the prior state of the art, but the Circuit Court of Appeals of the Eighth Circuit reversed the decision of the District Court. However, this same patent came up again for consideration in the case of New York Scaffolding Co. v. Lietel-Binney Construction Co., in the District Court for the Western District of Pennsylvania and District Judge Orr again declared the patent invalid for want of invention. This case was appealed to the Circuit Court of Appeals of the Third Circuit and affirmed in an opinion written by Judge Wooley. On a *writ of certiorari* from the U. S. Supreme Court the decree of the Circuit Court of Appeals for the Third Circuit, declaring the patent invalid for want of invention was affirmed November 8, 1920. Supreme Court Advance Sheets of December 1, 1920, page 28.

In the case of *Gas Machinery Co. v. United Gas Co.*, 228 Fed. 684, the court reviews a good many of the cases referred to in the quotation from *Willard v. Union Tool Co.*, used upon pages 18 and 19 of appellant's brief. Upon page 686 the court uses the following language:

"The authoritative cases are few which have considered the distinction between aggregations and combinations, except as it is complicated and confused by the effort to find the line between invention and mechanical skill. See *Walker on Patents*, Fourth Edition, 32 and cases cited. Rule of Aggregation is stated—properly as well as possible—in *McComber's Sixth Law of Secs. 42 and 51, Q. V.*:

"The distinction between an aggregation and a true combination is not always clear. The main test lies in an examination of the results—the function performed. If that result is the sum of the several actions of the elements, it is an aggregation; if it is the product of those actions—the action of one element so modifies the action of another that the resultary action differs from the sum of the separate actions—it is a true combination."

On page 691 of the last mentioned case the court uses the following language:

"The holding of the Circuit Court of Appeals for the Third Circuit in *Standard Co. v. Burdett Co.*, 197 Fed., 743, adopting the opinion in 196 Fed. 43, doubt-

less 'lies within the twilight zone' (196 Fed., 46); but assuming the patent there involved to have been rightly sustained, we think the conclusion rests on Judge McPherson's statement, 196 Fed., 46, that 'the result produced by the patent is a method of operation'; and though the claims seem also in the twilight zone between claims for mechanical combinations and claims for method, the stated object of the patent was 'to provide a signalling system.'

In the case of Gas Machinery Co. v. United Gas Improvement Co., *supra*, the court had under consideration a combination claim, which included an ajutage or device interpreting the rate of motion of the entering air blast along the flow pipe in a gas plant. The purpose of this device was to indicate to the person in charge of the plant when a sufficient amount of air had passed in so as to regulate what are termed the blows. The court held that this device was a mere indicator to the operator as to what the pressure was and had no co-action with any of the other parts of the plant and could not be the part of a combination in connection therewith.

Where appellant can find application for the statement which he has quoted from the case of Brown v. Zaupitz, 105 Fed. 244, in the record now before the Court, is more than I can understand, for the testimony of defendant's witnesses concerning the prior art which is not substantiated by patents, is well corroborated and established by exhibits which complainant's

own witnesses recognized and admitted were old in the prior art, and it is, therefore, needless in this case to take any exception whatever to the principles on this point as laid down in authorities cited by appellant.

Judge Bean's statement (R. 26) quoted by appellant as follows: "In reaching this conclusion, I am not unmindful of the presumption of the validity of the patent arising from its issue, or that the lubricating block manufactured by plaintiff has proved its superior utility in the logging business," certainly must give considerably more weight than what it otherwise might have, had Judge Bean arrived at his conclusion without giving due weight to the presumption of validity of the patent which arises from its issuance and to the presumption of invention which arises from the superior utility of an article. Had the prior art been indefinite and uncertain, appellant might then have asked this court for a careful consideration of the Gilchrist device, giving to it the benefit of the presumption just referred to. But the trial court after giving to defendant the benefit of all these presumptions has still been required to find a lack of invention and an exercise of nothing more than mere mechanical skill, for every element claimed in the Gilchrist combination is found in the prior art performing the same function in substantially the same manner. There is no new machine, no new mode of operation, no new result, and consequently no invention.

Taking appellant at his word, and the patentee at his word, as expressed in the language of his claim that his object is to provide a considerable quantity of lubricant and feed the same automatically and slowly upon the bearing pin of the pulley, and second to provide a pulley the bearing pin of which is adequately protected against dirt and dust, we find that each of these objects had been accomplished long before Gilchrist entered into the art.

On page 30 of appellant's brief it is contended that the questions of invention, as well as infringement, have often been determined by considering whether the defendant's device is more like that of the patent in suit than the alleged anticipations.

By referring to the cases cited under this heading, we find the language used is "mechanical equivalents" instead of invention. The application of this test to the present controversy can give little comfort to appellant, for we find that the interior integral reservoirs of the Ludford, LaBadie and Butters pulley block sides are far more strictly interior integral reservoirs than those found in the defendant's pulley block.

And as to all the other elements the prior art has disclosed elements performing the same function and producing the same results in identically the same way as they do in both the Gilchrist and the defendant's device.

In the case of *American v. Fiber* 90 U. S. 566, 23 L. Ed. 31, the court had under consideration the chemi-

cal process for the manufacture of paper fibers, and there is nothing in this case which can throw any light on the present controversy.

In the case of *Gordon v. Warder*, 150 U. S. 47, 37 Law Ed. 992, the court had under consideration a binding, or tying device in harvester machines, which was adjustable at the will of the operator so as to regulate the place where the bundle would be tied, thereby allowing the driver or operator, to have the bundle tied as nearly in the center as possible, even though there might be a variance in the height of the grain. The device was worked by a lever in the hand of the operator which caused the tying apparatus and the arm working in conjunction, or juxtaposition, therewith to move horizontally upon the shaft. The defendant's device was a fixed tyer, which was not adjustable and was held not to infringe, and I find nothing in this case which can throw any light on the Gilchrist-Mallory controversy.

In the case of *General Electric Co. v. Wagner Electric Mfg. Co.*, 130 Fed. 772, cited by appellant, the court was able to sustain the validity of this patent only after finding as is stated in the language on page 778:

"We have been unable to find in the prior art any single device or any sufficiently definite suggestion derivable from the various devices which sustain the contention of defendants that the patented improvement is merely the result of mechanical skill."

This same patent came up again for consideration in the case of General Electric Co. v. Allis-Chalmers Co. 197 Fed. 558, and in this case the court limited the patentee's invention to a transformer having two separate ventilating systems, independently controlled, one for cooling the coils and the other the core, which could not be found in the prior art, and as so limited, held that it had not been infringed by the defendant.

As to the cases cited on pages 42, 43 and 44 of appellant's brief, I feel that it will be unnecessary to give any detailed consideration, for there is no contention but what some competent evidence is required to overcome the presumption of validity which arises from issuance of the patent just the same as some competent evidence is required to overcome the presumption of the regularity of any other official act, and as is more fully considered under the heading in my brief, "Presumption a Mere Rule of Evidence." However, an examination of these cases will disclose the fact that the same rule of evidence applies in connection with patent matters as in other matters, and that if the circumstances are such as to throw doubt upon the patentee's testimony, or evidence, the same will be discounted and disregarded just as readily as the evidence of the defendant. This fact is well illustrated by the last case cited in appellant's brief on page 44, Clark Thread Co. v. Willimantic Co., 140 U. S. 488, 35 L. Edition 521. In this case the doubtful testimony which the court had under consideration was the testimony given for the purpose of sustaining the patent sued upon where the patentee was trying to fix the date of invention prior to that of a

British patent cited as an anticipation, but the court held that the evidence given for the purpose of sustaining this patent was not sufficient to disprove that the invention had been anticipated by the previous patent cited by the defendants, and the cause was remanded to the lower court with instructions to dismiss the bill of complaint.

In *Morton v. Llewellyn*, 164 Fed. 693-697, cited on page 60 of appellant's brief, the Court had under consideration the patentable novelty of a drainage and ventilating system for toilets, bathtubs, etc. Only one patent was set up as an anticipation, and the elements of that patent are not given, but on page 697 the Court uses the following language:

"A careful comparison of those exhibits with the patented fitting satisfies us that the only elements of novelty in the latter are the inclined deflectors within the drainage pipe and vent and the enlargement of the latter, neither of which elements do we find in the appellant's fitting. The latter with the exception of a change of angles and a shortening is exactly similar to Exhibits 1 and 2. It may be and probably is true that the deflectors and enlargements of the appellee's fittings and their compactness makes them more desirable, and no doubt accounts for the favor they are shown in the markets, but that circumstance is unimportant, since in our opinion the appellant is not shown to have infringed."

In the case of *Keystone Mfg. Co. v. Adams*, 151 U. S. 139, 144, cited by appellant on page 61 of his brief. The language of the court on page 143 should also be taken into consideration, which is as follows:

“While it is true that the mere fact that a device has gone into general use and has replaced other devices which had previously been employed for analogous uses does not establish in all cases that the latter device involves invention within the meaning of the patent laws, yet such a fact is always of importance and is entitled to weight when the question is whether the machine exhibits patentable invention.”

In the earlier devices for shelling corn, the wheels with projections revolved against the direction in which the corn entered. The patentee in this case changed the winged shaft so as to cause the wheels or projections to revolve in the same direction as the corn enters, and thus force the corn rapidly forward into the sheller, each ear being out of the way before the second ear came in, and thereby avoiding any chance of clogging.”

Near the top of page 144, the court used the following language:

“We also concur in the reasoning and conclusion of the court below affecting the novelty of the invention. While it is true that the device patented by Augustus Adams, the father of the present patentee, in May, 1866, was intended to effect the same purpose, and used likewise a revolving shaft with wings or protuberances, *yet the mode of operation was entirely different.*”

In the case of *Irwin v. Hasselman*, 97 Fed., 964, the court had under consideration the question of an infringement of an improvement in bookbinding. The claims as originally drawn covered "a book having leaves rendered flexible at a line parallel to and a short distance from the back, substantially as and for the purposes set forth." The patent office found this claim anticipated by other patents, and required an amendment of the claim whereby other elements were included. It was found by the court that the defendant used this element and on page 968 uses the following language:

"Had the patent been allowed on such claim, infringement would stand confessed by the answer, and the question of patentable novelty upon the showing of the prior art would alone remain for consideration; and on that inquiry the test of invention would not be of simplicity alone in the device, nor in the fact that like means may appear as an element in prior devices where the use is not analogous. There may be invention in applying a device which is either simple or old *where it is used in a new way, and accomplishes a new result.*"

And preceding this statement the court says:

"And the testimony is clear and uncontroverted that the books made by the appellee of which infringement is alleged are in every particular constructed in old and well-known methods, except that the leaves are creased as described in the first claim of this patent."

Appellee was, therefore, considered within his rights and the bill dismissed for want of equity.

Applying the reasoning in this case to the state of facts now before the courts, let us presume that Gilchrist first applied to the patent office for a patent in which the claim covered only a logging block or a pulley block having a side provided with an interior oil reservoir. This claim would immediately have been anticipated by the patents of Ludford, Labadie and Butters, saying nothing about the Morgan patent. All of the elements in appellant's combination, or block, in the exact combination as therein used, excepting his oil reservoir, were admittedly old by the complainant, so that by applying the test as laid down in the case of *Irwin v. Hasselman*, *supra*, the complainant's bill would necessarily need to be dismissed for want of equity.

National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co., 106 Fed. 693. On page 697 we find the following language:

"In 1892 85 per cent of these railroads, controlling 80 per cent of the cars using iron brakes, had adopted those made under these patents to Hien, and in 1898 more than one million brake beams constructed under these patents had been manufactured and sold. *These facts establish neither the novelty nor the patentability of his device*, but they certainly challenge admiration, and demand that the presumption of validity which supports his patents shall not be stricken down without careful consideration and cogent and convincing proof."

Ellen combined, first, a hollow or tubular metallic beam; second, a metallic bar corresponding with the king post of a truss, called a "strut," provided with a slot for the reception of the brake lever, an eye at one end to receive the tension member, and a clamp at the other end to secure it to the compression member. Third, a metallic rod, corresponding to the truss rod of a truss, called the "tension member," provided with threads on each end to receive nuts. Fourth, plugs or caps to inclose the ends of the compression member, provided with holes for the passage through them of the ends of the tension member, with recessed nut seats with surfaces at right angles to the lines of the ends of the tension member, with circular shoulders a short distance from their inner ends which fit tightly upon the ends of the compression member and permit the caps to enter therein for a short distance only, and with lugs or projections which extend through the slots in the compression member and into notches in the brake head. Fifth, nuts screwed tightly upon the ends of the tension member to hold beam, caps, and brake head securely together. The claim read:

"The combination, in a brake beam, of a hollow beam, a strut, end plugs or caps, 8, and a truss rod, 3, which extends through the caps, 8, and is provided with nuts, substantially as and for the purposes specified."

On page 703 of the reported case, the Wabash brake beam was described by a witness as a trussed wooden brake beam in which the ends of a tension rod passed through the ends of the wooden brake beam and

through iron plates thereon and was secured in place by nuts screwed upon its threaded ends. And the court said:

"Unsupported oral testimony of a prior use is always open to suspicion and it cannot prevail over the legal presumption of validity which accompanies the patent, unless it is sufficient to establish such a use beyond a reasonable doubt. The testimony relative to the use of this Wabash beam is not of that character and it will not be further considered." (Citing cases.)

For the same reason the evidence of use in 1884 and earlier of a double trussed wooden beam on the Burlington road must be disregarded."

Consideration of the Westinghouse patent brake beam was dismissed by the Court as follows:

"It lacks the adjustability, compactness, and simplicity of construction which his brake beam exhibits, and whatever it has done in the past or may accomplish in the future has not been and cannot be brought about by this wooden brake beam by the mechanical means described and claimed in Hien's combination, because it contains neither the single tension member with threaded ends passing through the ends of the compression member, nor nuts thereon securing it in place by means of which the tension of the structure, the resilience of the beam, and the coning of the shoes may be produced, adjusted, and maintained; and these are essential elements of the combination of the appellants." (Page 705).

On page 707 the court uses the following language:

"The prior art discloses no combination of the elements of Hien's brake beam in the way which he describes. In other words, the method of combination of the old devices which he presented was new. Nowhere in the history of the art can the tension member, with threaded ends passing through the ends of the hollow metallic compression member, and through caps thereon, secured in place by nuts on its ends, by the mere turning of which the rigidity of the structure, the resilience of the compression member, and the coning of the brake shoes to the tread of the wheels may be produced, adjusted and maintained, be found. Yet this is the principle of his invention, the mode of its operation, the peculiar combination of devices which distinguishes it from other brake beams."

Near the bottom of page 707, the court uses the following language:

"It is true that the extensive use of a machine or combination which is clearly without novelty does not dispense with that statutory requirement, and that it will not alone sustain a patent. McClain v. Ortmayer, 141 U. S. 419, 428, 12 Sup. Ct. 76, 35 L. Ed. 800; Duer v. Lock Co., 149 U. S. 216, 223, 13 Sup. Ct. 850, 37 L. Ed. 707; Olin v. Timken, 155 U. S. 141, 155, 15 Sup. Ct. 49, 39 L. Ed. 100; Klein v. City of Seattle, 77 Fed. 200, 204, 23 C. C. A. 114, 118, 44 U. S. App., 741, 748."

At the top of page 709 the court uses the following language:

“Again, since a function is not patentable, a combination of functions is not; nor is a combination of mechanical devices or elements and one of the functions of that combination. It is a combination of mechanical elements, and of such elements alone, that may be protected by the grant of a patent.”

In the latter part of this case are considered some alleged improvements which involved only mechanical skill in the mind of the court and could not be the foundation for a patent. For example, on page 719 two claims were considered in which the previous combination had been added to by introduction of a wedge which was inserted between the compression member, and the collar of the strut for the purpose of taking up any play, under the claim *that it is not a patent for a wedge but for the new combination of the wedge with the brake beam of Hien*, in consideration of which the court used the following language:

“But it is conclusive answer to this contention that there is no more invention in the combination of a wedge of the usual form, discharging its customary function of tightening the parts of a mechanical device, with Hien’s machine, than there is in the discovery of the wedge itself and its common use for this purpose. If this were not true, every combination of an old machine with a wedge, performing the function of tightening its parts, would constitute an invention.”

The testimony which has been introduced by the defendant in this case is fully as convincing and posi-

tive as the character of the testimony referred to on page 721 of the brake beam case, and which the court there held was such as to defeat the patent. Even if it were to be conceded that the Morgan patent did not fully anticipate the Gilchrist patent, the providing of the interior reservoir integral with the side would come within the language used by the court on page 723, as follows:

“There are some mechanical devices so obvious and appropriate for the performance of their accustomed functions that the common knowledge and experience of those unskilled in mechanics, to say nothing of those learned in the art, at once suggests their use when the results which they customarily attain are desired. * * * ”

“There can be neither discovery nor invention in applying a remedy so plain or in combining a contrivance so obvious with an old mechanical device which needs it.”

There was no great need for the oil reservoir block until skyline logging came in vogue, and it was the defendant, and not the complainant, who introduced the large skyline blocks with reservoirs in their sides and placed them up on the market long prior to the time complainant entered this field. (R. —).

In *National Machinery Corporation v. Benthall Machinery Co.*, 241 Fed. 72, on page 78 the following language is used:

"It is insisted by complainant that a new combination of old things may be patentable, and in support thereof cites the cases of *Loom Co. v. Higgins*, 105 U. S. 580; *Seymour v. Osborne*, 11 Wall. 516; "*The Barb Wire Fence Patent*," 143 U. S. 275, 12 Sup. Ct. 443; *Bates v. Coe*, 98 U. S. 31; *Hobbs v. Beach*, 180 U. S. 383; *National Hollow Brake Beam v. Interchangeable Brake Beam*, 106 Fed. 693."

"This rule is well established, but in the case upon which it relies the combination is new and the result of the combination of the old elements is also new. In the case at bar there is no cooperation between the elements; the throats having their sides meeting at an angle, a protected point is disclosed in Hazelton's patents and is, therefore, not new. Wedge-shaped throats are disclosed in the Hazelton patent No. 253,554, and the Scott patent No. 125,338 is also old. There being no cooperation between these functions, we have the result that each must act in the old way, the joint product being aggregation of the old results, which under the rule is not patentable."

In the case of *Diamond Patent Co. v. S. E. Carr Co.* 217 Fed. 400, this Court had under consideration a patent showcase comprising a plurality of glass plates, the edges of which are spaced from the adjacent plates, a felt cushion filling the space between the adjoining plates, the plates being cemented to the felt; each plate being adapted to freely vibrate in its natural plane of vibration, and prevented by the felt cushion from imparting its vibration to the adjacent plates. The show-

case relied upon as defeating the validity of this patent under the head of prior analogous use in cases was one in which the felt had been cemented by a glue or cement which penetrated the entire felt, making it a hard substance, and clamps, bolts and screws had been used as in the older cases, so that there was no elasticity whatever, and the same were given up and abandoned as a failure, practically all of the cases so made having broken through vibration.

In the Gilchrist-Mallory controversy there is no doubt as to the function which the various elements referred to in the prior art were designed to perform, for they were not only in use as actual operative devices, but were also explained, described and illustrated in previous patent publications.

In the case of *Imhaeuser v. Buerk*, 101 U. S. 660, 25 L. Ed. 945, cited on page 69 of appellant's brief, there is found nothing which can be of service in arriving at a conclusion in this case, for the reason that all of the devices of the prior art were so substantially different from those involved in the combination that they could not be relied upon as anticipations.

On page 947 the Court uses the following language:

"They differ not only in construction, *but in the mode of operation*, and in almost every particular which gives value to the device as a time detector for watchmen, the foreign patent being much more cumbrous and inconvenient than that of the complainant."

In the case of *Griswold v. Harker et al.*, 62 Fed. 389, the Court had under consideration Patent No. 229,280 for an improvement in a waffle iron, so constructed that the hinge connecting the parts of the pan formed part of one of the pivots or journals on which the pan rotated, while the opposite pivot or journal was formed by the divided handle, so that the pan would open in the same plane with its axis of rotation

Nothing embodying this principle was shown in the prior art. On page 392 the Court says:

“None of the utensils described in these anticipating patents have such a hinge. Not one of them is provided with any hinge at all.”

There is no contention but what a combination claim may be valid if it embodies a new element not heretofore found in the prior art, and if the combination of elements is such as to bring about a new mode of operation.

We find nothing in the case of *Leed & Catlin Co. v. Victor Talking Machine Co.*, 213 U. S. 301, 53 L. Ed. 805, which can throw any light on the present controversy. For it is true that a combination as an invention is a unit in contemplation of law. However, before a combination can be the subject of invention in an operative mechanical device, there must be either some change in the mode of operation from that disclosed in the prior art, or the introduction of a new element therein which in itself would be the subject of the invention as a separate element or article of manufacture.

The case of Gormully & J. Mfg. Co. v. Stanley Cycle Mfg. Co. et al., 90 Fed 279, merely contains the broad statement quoted on page 69 of appellant's brief, without in any way giving the facts on which it is based.

I do not take issue with this above statement. The finding of each of the separate elements may not necessarily defeat a combination claim, but if the mode of operation is found in the prior art, and each of the elements is found performing the same function in the prior art, the combination will be defeated.

In the case of Yestera v. Hardesty Mfg. Co., 166 Fed. 120-125, no light whatever is thrown upon the controversy here, as the question under consideration there by the Court was merely one of a method of arriving at the damages or profits recoverable after having determined there was an infringement.

In the case of Stebler v. Riverside Heights Orange Growers' Ass'n., 205 Fed. 735, and page 738 from which appellants quote in their brief, the Court has merely said:

"The invention, we think, was an important and distinct advance in the art, and is not anticipated by former patents. Those chiefly relied upon for this defense are the Ish patent, already referred to, the patent to Bailey and the one to Hutchins. Enough has already been said of the Ish machine to make it ap-

parent that as to it plaintiff's invention was a substantial improvement and not without patentable novelty."

That is correct. The mode of operation as shown in the description of the patent is entirely different from the mode of operation in complainant's patent. The court then goes on to say:

"It is not deemed necessary to describe in detail the Baily and Hutchins devices. They are not infringed by the plaintiff's claims. True, we may pick out one similarity in one of these devices, and one in another, and still one in another, and, by combining them all, anticipate the inventive idea expressed in the Strain patent, but the combination constituting the invention is not found in any one of them."

After which reference is made to the opinion of this Court in the case of *Los Alamitos Sugar Co. et al v. Carroll*, 173 Fed. 280.

While the Bailey and Hutchins devices are not described in the report, I take for granted that they, too, had a different mode of operation or the court would not have passed them by with this slight reference, and then in turning to the case of *Los Alamitos Sugar Co. v. Carroll* for the purpose of determining just how far this Honorable Court went in that case on this question, we find that the Court distinctly indicated that the other devices of the prior art referred to had a different mode of operation. On page 285 we find the following language:

“Expert witnesses for the respective parties—Boyd and Bates—seem to agree in their opinion that the *principle of operation* of the Chisholm device is different from that of Carroll, and, without going into details, we think it sufficient to say that the Chisholm patent does not anticipate all of the elements found in the claims of the Carroll patent hereinbefore set out, and that it is not capable of being operated or used in the manner in which Carroll’s device was intended to be operated and used. Nor do any of the other patents relied upon provide a complete dumping apparatus *which will operate upon the principle of Carroll’s*. It is not sufficient to constitute anticipation that the devices relied upon might, by a process of modification, reorganization or *combination with each other, be made to accomplish the function performed by the device of the patent sued on*.

These statements show that this Honorable Court is in harmony with the rule as laid down in the Supreme Court and in the various other Circuits concerning *the necessity of looking to the mode of operation* in determining whether or not invention exists when the Court has under consideration a combination claim made up of elements which are old in the art.

In the case of *Johnson v. Railway Co.*, 33 Fed. 499, the Court had under consideration a patent in which the invention consisted in the combination of an oscillating platform with a movable frog or switch, the platform being arranged with a railroad track so

that it could be operated by the weight of the horses, or other animals, thereby moving the switch from one track to another. If a driver, approaching the platform from the direction towards which the free end of the switch points, desired to take the right hand track he had but to turn his horses towards the right; their weight upon that side of the platform would move the switch latterly, close the left-hand track, and direct the car upon the right-hand track. If, however, he wished to take the left-hand track, the natural turn of the horses in that direction would enable him to do so. In this manner, by simply directing the weight of the animals upon the proper side of the platform, the switch was operated, and held in the desired direction. The claim being the combination of an oscillating platform, arranged for operation by the weight of the draft animals of the car, with a switch, in the manner substantially as herein shown and described. It appears the prior art did disclose a locking platform; also disclosed horizontally moving switches, but none of the structures which show the platform show the switch, and none of those which show a switch show a platform for operation. On page 501 the Court says:

“No one previous to him had produced a practical horse-railroad switch which could be operated by the weight of the draft animals. Certainly no one had combined a tip-table with a horizontally moving switch-tongue.”

The principle, or mode of operation, of this com-

bination was, therefore, not disclosed by the prior art, and there was a new coaction of elements.

The first paragraph of the quotation shown on page 72 of appellant's brief appears to be appellant's construction of what the court said in the case of Forsyth v. Garlock while the second paragraph appears to have been selected from the case of International Telegraph Co. v. Kellogg Switchboard Co. The first paragraph is not an accurate quotation from the case of Forsyth v. Garlock in that the language is not qualified as it was by the Court. The language of the Court as found at the bottom of page 463 in the foregoing case is as follows:

"The respondents cite over forty patents alleged to either anticipate or narrow the art. Our general observation as to these is that the citation of so many patents by respondents in an infringement suit *sometimes tends*, as we have several times said, not so much to weaken complainant's position as to strengthen it by showing that the trade had long and persistently been seeking in vain for what the complainant finally accomplished."

The citations from the prior art in the foregoing case were found by the Court to be very remotely connected with the art under consideration, and it was by reason of the fact that they were not intended for a similar use that the Court failed to consider them as anticipations of the patent. Immediately following the quotation above given the Court goes on to say:

“So far as we do not further refer to these patents it will be because they are covered by what we have already stated as to their relation to other arts than that now before us; or because they are only a part of the history of the particular art involved here as explained by Pratt in the manner we have already stated. For example, Daft apparently had mainly in mind a material suitable for sheathing ships, as to which it is well known that at the time of his invention in 1860 ship builders were looking for a substitute cheaper than copper, then the standard sheathing. However this may be, he describes his invention as one for ‘improvements in coating iron.’ It was purely of a general nature in that broad art and it had no special adaptation to the narrow art which we have before us. While perhaps Forsyth might successfully be charged with infringing Daft, if Daft’s patent were in force in the United States, Daft did not anticipate Forsyth in the particulars to which Forsyth’s invention relates because Daft did not trouble himself about the peculiarities necessary to make a successful gasket.”

A like examination of the other patents referred to will disclose the fact that the citations which the Court had in mind were not citations which could have conveyed any knowledge to the skilled mechanic in the making of steam gaskets.

A similar examination of the citations which the Court had under consideration in the case of *International Telephone Mfg. Co. v. Kellogg*, 171 Fed. 651, indicates a similar situation.

Just following the words at the end of the quotation which counsel for appellants used, beginning with the last word on page 654, we find the following:

"Stromberg and Carlson (patent No. 580,434), prevented packing by the wedging and separating action of roughened electrodes, aided by elasticity of the plush circumferential wall. Stromberg-Carlson Tel. Mfg. Co. v. American Elec. Tel. Co., 127 Fed. 704. While the result, in one particular, was of the same general character, *the idea of means was totally different*. Nothing, of course, was taught respecting the granular carbon type by the earlier transmitters (Short, Berliner, and others) in which the electrodes were in direct contact."

Near the center of page 655 we find the following language:

"But neither the White patent nor anything else exhibited in the prior art would have told the mechanic why the changes ought to be made. The mechanic in Dean had first to be informed by the inventor in Dean."

We have no such situation with reference to the Gilchrist blocks. At the time Gilchrist made his application for patent it is conclusively presumed that the Morgan, Ludford, Labadie, and the Butters patents were all before him, each of which disclosed an interior reservoir in the side of the pulley block. The purpose of the reservoir in each of these pulley blocks was the same as the purpose of it in the Gilchrist pul-

ley blocks. The oil feeds from the reservoir by gravity through the pin and onto the bearing surface in the same way. It is the *inventor only who is protected* in his combination, *and not the mere mechanic* who combines old elements already well known in the art to perform their functions and without introducing any new mode of operation.

Were it not for the fact that the Collar-button Case involved an article of manufacture rather than an improved machine, and that the Court has so frequently held that the making in one piece that which was previously made in two is not invention, and the further fact that this particular article, a pulley-block side made in one piece was old in the prior art, the case of *Krementz v. Cottle* might then be considered as throwing some light upon the present controversy. The Court seemed to give considerable importance to the particular shape of the round hollow head and had treated the article largely as though it had under consideration a design patent. However, had there been a previous one-piece collar-button on the market, it would not have involved invention, and as stated in the case of *Herzog v. Keller & Co.*, 234 Fed. 85, near the bottom of page 86:

“The case must, however, be very rare in which the bare idea involves invention, to consolidate several members into one.”

The case of *Cimiotti v. American*, 115 Fed. 498, 198 U. S. 408, cited on page 78 of appellant's brief,

is clearly distinguishable from the Gilchrist-Mallory controversy. In the Cimiotti case the mode of operation of the device of the Lake and Covert patents referred to, as well as several of the elements, were different from those of the patents sued upon, and the opinion of the Supreme Court clearly indicates that if this old device had embodied the same mode of operation as that of the Sutton patent it would have defeated the Sutton patent.

As is set forth in another portion of this brief, it doesn't make any difference how old an article may be, or whether it is but a mere paper patent, patents are not granted to all persons who may have displayed inventive ability. It is only to the first inventor that the Government is authorized to grant a patent.

In the case of Waterbury Buckle Co. v. Aston, 183 Fed. 120, cited by appellant on page 75 of his brief, the Court had under consideration a patent for a rustless suspender buckle, calling for the combination with a frame having an upper and a lower side and an opening between the same, of a lever pivoted to the upper side of the frame in position to have its clamping edge co-act with the upper edge or top of the lower side of the frame, and a piece of webbing having its lower reach attached to the lower side of the frame and its upper reach pass from front to rear through the said opening and engaged by the clamping edge of the lever which deflects it approximately over the upper edge or top of the lower side of the frame.

While it is true that on page 122 the Court does use the language "that it seems necessary to examine only the LaChappelle patent, that being the nearest approach to the patent under consideration," there is nothing in the case to indicate that any of the elements of the patented buckle not shown by the LaChappelle patent were disclosed by any of the other citations, and in view of the numerous declarations of the courts to the effect that all of the prior art should be examined for the purpose of determining whether or not a claim disclosed invention, it must be presumed that none of these other devices contained any of the elements of the patented combination which were not disclosed by the LaChappelle patent.

In the case of *Kryptok Co. v. Stead Lens Co.*, 207 Fed. 95, cited on page 79 of appellant's brief, it is instructive to call attention to the fact that the quotations selected by appellant is based upon the decision in the case of *Loom Co. v. Higgins*, 105 U. S. 580.

The case of *oom Co. v. Higgins* is the leading case on this subject in the United States, and it is the one which is used as the authority for like statements of the Court in most all of the cases where it has been indicated that the invention is not overcome by the ability to find different elements of the device in previous devices in the prior art.

A thorough understanding of the case of *Loom Co. v. Higgins* will immediately dissipate any belief that a combination patent may be sustained if all its elements are found in the prior art, performing the

same function in a machine having the same mode of operation. It was the change in the mode of operation resulting from a new co-relation, or co-action, of parts which resulted in the construction of a loom with a far greater capacity by reason of the higher speed with which it could be operated that marked invention in that case.

It is interesting to note that in paragraph 6 on page 94 in the case of *Kryptok Co. v. Stead Lens Co.* the Court recognized the distinction between a product patent and a mechanical, or machine, patent, for the Court there uses the following language:

“This is a product patent case. The thing produced was clearly unknown before, and it is, therefore, immaterial that the separate features of the invention may be found in the prior art.”

However, an examination of the citations of the prior art in this case discloses the fact that there was nothing in the prior art to indicate that a bi-focal lens could be produced by the fusion of another piece of glass of different register in a recess provided in the main lens whereby the bi-focal lens is biaxial. The devices of the prior art referred to showed only lenses in which a small lens was fitted in the lower section of the main lens of the same thickness of the original lens, with their edges cemented together, or in which a small lens coming to a feather edge was cemented onto the regular lens, and lenses in which a colored piece of glass was welded to a transparent piece of glass, not for the purpose of obtaining a bi-focal lens, but for the purpose of protecting the eye against

light, it having theretofore been considered impossible to fuse upon the eyeglass an additional piece of glass in such a manner as to produce a bi-focal, biaxial lens.

There is nothing in this case which should cause the Court to disregard all the prior arts excepting the one patent which the complainant himself selects as the nearest to anticipating his device.

In *Underwood Typewriter Co. v. Elliott-Fisher Co.*, 165 Fed. 927 the Court had under consideration the Remington tabulator patent. The patent relied upon as an anticipation of the claims of this patent failed to show this combination or use of stopping devices. In fact, the Court was unable to tell just what sort of device or mechanism was intended from the description in the patent cited as an anticipation. In view of this situation the Court very properly refused to consider the cited patent as an anticipation of the Remington tabulator patent.

The case of *Badische Anilin & Soda Fabrik v. Kalle & Co. et al*, 104 Fed. 802, probably discloses a proper statement of law applicable to the facts involved in that case. The Court had under consideration a chemical formula for the preparation of dye-stuffs and it is quite probable that the publications referred to did not disclose sufficient information to operate as an anticipation of complainant's formula.

At any rate, I do not feel that a digression in the

field of chemistry will prove of much assistance to the Court in determining this controversy.

Likewise, the quotation from *Loew Filter Co. et al v. German-American Filter Co.*, 164 Fed. 855-860, may be a proper statement of the law, but it is most strenuously insisted that the devices of the prior art as disclosed in this case are of such a nature that it does not require the exercise of any imaginative faculty in order to find that there was no room left for invention at the time the Gilchrist device was brought upon the market.

In the case of *United States Fastener Co. v. Bradley*, 149 Fed. 222, cited by appellant on page 83 of his brief, the Court sustained a patent for a separable button catch or glove fastener comprising an apertured washer and an eyelet having a shank of less diameter than the aperture of the washer, and having two enlargements securing it in the aperture of the washer and slitted lengthwise through the shank and enlargements as and for the purposes set forth. In the glove fasteners of the prior art the resilient member had usually been the head, although there were two devices in which the socket was slit so as to spread and receive the head and afterwards spring back upon the same. The manner of fastening these sockets to the material was such that the material was required to give with the socket and it was hard upon the material. The socket of the patent having a washer to sustain and hold it in place on

the shank of the eyelet made a much firmer device and it was so formed as to relieve the strain upon the material and was held to possess novelty and disclose patentable invention. However, in the very next case reported in this volume of *United States Fastener Co. v. Stahel et al*, page 225, the Court had under consideration the patent for a button, or snap fastener, in which the head or socket member, was the resilient member of the catch. The resilience of this head or socket member was brought about by making the same of metal, and in dish shape, so that the edges of the head bent over on itself and extended to form a flange that extended rearwardly and inwardly. On page 225 the Court says:

“It would, in my judgment, occur to any mechanic or person skilled in the art. It is plainly suggested in prior inventions in the art.”

After referring to previous statement and decision of Judge Coxe, the Court says:

“But this condition of the art does not warrant the upholding, as disclosing patentable novelty and utility, every device, not before used in the art. When a device made the subject of a claim is so plainly indicated in the prior art that one possessing ordinary skill therein will naturally see it and its construction and utility, we can hardly accredit him with inventive skill if he does see it, and puts it in form for use.”

In the case of *John Kitchen, Jr. v. Levison*, 188 Fed. 658, this Court had under consideration the

Levison patent to a manifold order book, comprising a double carbon sheet and a plurality of recording sheets, each recording sheet outside the stub being divided into a plurality not less than three of separable parts joined along the line of perforations, each part being not greater than the parts next it on the side towards the stub, and a carbon sheet extending the width of the whole of said parts, excepting the outermost, said recording sheets having stubs to which they are attached along lines of perforations, said stubs and one side of carbon sheet being all bound together to form a book, substantially as described.

The prior art did not disclose a combination of the carbon sheets bound in the book in connection with folded leaves whereby the one carbon sheet could be utilized for making all of the carbon copies. There were books in which loose carbons were used between the several copies of the order sheet, and also a book in which a double faced loose carbon was used between the second and third copies, the second copy being a transparent copy so that the carbon would show through it. The Court held that the patented device stood the test of invention, although the change from the prior art was a simple one.

The Court held that while the advancement was slight, the article was one of manifest utility and that it would give the patentee the benefit of its decision on the question of fact as to its constituting invention.

Inasmuch as counsel for appellant in this case was counsel for the defendant in the foregoing case, it is barely possible that the decision of this Honorable

Court in that case has encouraged him to believe that he may induce the Court to go even a little further than the courts have gone in the so-called "twilight zone" cases for the purpose of sustaining the Gilchrist patent.

Counsel for appellant in classifying the Morgan, Ludford and Labodie patents and the other publications as coming under the rule laid down in the cases cited on page 84 of his brief, has availed himself of a license for comparison and classification of such wonderful elasticity that I feel an appropriate answer to the same would be to boldly state that the Morgan, Ludford, Labadie, Gilley, Butters and all other patents and publications cited by defendant are wholly without the rule laid down in these cases, operate as a complete anticipation and show utter lack of invention, and then refer Your Honors to the various patents and publications introduced in evidence and request you to see the rule laid down by the reports in the Supreme Court library.

The Morgan, Ludford, Labadie, Gilley and Butters patents are not publications embodying indefinite descriptions concerning which there is doubt as to their meaning, or as to the time of publication, but on the contrary, are intelligible drawings and specifications of patents concerning the date of which there can be no doubt, and there is nothing vague or uncertain as to the mode of operation of the devices therein described. As to the other publications, they were in-

troduced principally for the purpose of corroborating the testimony of witnesses as to the time when the devices therein described were in existence. These publications and this testimony being well sustained by the introduction of the actual devices so described. Complainant's own witnesses, and even complainant's counsel, admitted the correctness and accuracy of this testimony and finally consented to stipulate that each of the devices was old in the prior art, excepting that Brother Peck as attorney for complainant refused to admit that an interior oil reservoir in one of the sides of a pulley block was old in the prior art, even in the face of the patents so introduced.

There is no such complicated or doubtful situation as was presented by the telephone cases referred to, but even in the telephone cases the decision cannot be considered as having the force which could have been attributed to it had there not been a dissenting opinion by Justices Bradley, Field and Hart.

In the case of *Seymour v. Osborne*, 78 U. S. 23, 11 Wall. 516, the Court had under consideration a patent for a harvester in which the grain fell upon a quadrant platform and was swept off by sweep rakes in quantities appropriate for binding, and at the rear of the harvester in such a position as to be out of the path of the harvester on the succeeding round or trip. Most of the devices referred to as part of the prior art were not publications but mere experimental devices described only by testimony which was uncertain both as to time and use. And as to these

prior publications, or devices, concerning which there was certainty, none of them embodied the self-raking device or the true quadrant platform, the nearest approach being a rectangular platform to which was attached an additional curved portion, which required the services of a man to rake the grain off of the platform by hand.

In the case of *Cohn v. U. S. Corset Co.*, 93 U. S. 366, 23 L. Ed. 907, while there was a dissenting opinion by Judge Clifford to the effect that the foreign patent was not sufficiently described to enable a person skilled in the art or science to make, construct and use the same, the prevailing opinion of the Court written by Justice Strong was to the effect that the English patent was sufficient to operate as an anticipation to the patent sued upon, and the patent sued upon was therefore declared invalid and the bill dismissed.

Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 421.

Had counsel for appellant added to the quotation which he has used on page 84 of his brief from page 421 of the foregoing case, the very next sentence, he would have disproved his own contentions that the statement from this case is apt. The very next sentence following that quoted by appellant is as follows:

“As hereinafter observed, a *process patent* can only be anticipated by a similar process. It is not

sufficient to show a piece of mechanism by which the process might have been performed.”

It is a matter of common knowledge that a process which involves chemical actions upon the materials worked upon, might, with very slight changes, either enhance or entirely destroy the ultimate product, and yet the mere process itself may in no way indicate to the person what might be the effect of such a slight change.

But in a mechanical patent for an improvement upon a machine, by the introduction of an element having a well known function, the effect of the introduction of such elements is immediately apparent to the human eye, unless it is being combined with other elements or operative parts of the mechanism in such a way that they co-act one upon the other and introduce a new principle, or new mode of operation.

The barbed wire patent, 143 U. S. 275 was considered in the case of *Knapp v. Morss*, 150 U. S. 221, 37 L. Ed. 1059. In this case various other cases on the subject of a combination of old devices are well considered. The Court held that an adjustable wire dress form would even be anticipated and held void on account of the umbrella.

In the case of *Western Electric Co. v. Home Telephone Co. et al*, 85 Fed. 649, the Court had under consideration a patented device for an improvement in the telephone switchboard. The thing which the

patentee was attempting to accomplish was to effect a more perfect circuit between the connecting lines by reducing the resistance at the switchboard and giving as far as possible a perfect, unbroken circuit, and at the same time having such a switchboard as to enable the operator to test out the lines. It was thoroughly explained that a telephone circuit is a weak circuit, and that every connection or contact which is made necessary tends to reduce the efficiency of its qualities for carrying the human voice. The slight particles of dust, or other foreign materials, which lodge in the connections, tend to reduce the efficiency, thereby making it highly essential to have as few exposed contact points as possible. Near the bottom of page 654 we find the following language:

“But defendants’ witness Clark, responding to cross questions 48, 49 and 50, says he does not find in patents Nos. 292,866, 330,059, and 330,060, that, when two lines are connected together, without reference to the particular board upon which the connection is completed, there is a talking circuit which is free from all of the separable switch contacts of the spring-jack switches of the two lines thus connected, as such feature is exhibited in defendants’ system and in the Scribner patent No. 330,061 in suit. This witness was asked to distinguish and point out any differences that may exist between patents Nos. 292,866, 330,059, and 330,060, and, after detailing alleged differences, he states that he finds that the patent No. 292,866 is the same as the patent No. 330,061, the patent in suit, with certain exceptions, which he specifies. What-

ever, then, be the merit or demerit, or the accuracy or inaccuracy, of these statements and discussions, it remains that the patents mentioned do not, as they now exist, according to the witness, contain the invention covered by complainant's patent, but, on the contrary, that changes must be made in them before it is even pretended that they will show this invention."

This is as near as the reported case comes to explaining the likeness or differences between the patent sued upon and those of the prior art relied upon as anticipations. When we take the statement of defendants' witness, as above given by the Court, that he does not find in the prior patent means whereby the lines are connected together without reference to the particular board upon which the connection is completed so as to form a talking circuit which is free from all the separable switch contacts of the spring-jack switches of the two lines thus connected, which is the very object at which the patentee was striving, namely, to reduce the points of contact, and when we realize that the efficiency of a telephone system is dependent upon the reduction of the contacts and the perfection of the contacts, there is no reason to believe but what the Court was correct in the conclusion it came to in this case.

The dealing with an electrical current, or circuit, for telephone purposes, such as was under consideration in the foregoing case, is an art of such refinement that the distinction of the differences must be very closely drawn by the Court. But, in a pulley block,

where we are dealing with a mechanical construction, in which the function of each element is plain and obvious, and its function and known connection with the entire device, needs no explanation and requires no refined insight into the delicacies of its mechanism, it certainly cannot be said that the functions of these elements in the prior art are not obvious to the ordinary individual, and much more so to the skilled mechanic.

In the case of *Clough v. Barker*, 106 U. S. 175, referred to by counsel on page 85 of his brief, the Court had under consideration a patented gas jet, or burner, provided with perforations near its base, allowing the gas supply coming from the inner tube to the surrounding tube to be controlled, and so as to permit gas to come from the face of the tube, the purpose thereof being to control carburated gas from the burner to the point of combustion. The device relied upon as an anticipation was a gas burner in which an outer tube surrounded an inner tube having a slit in its side, the outer tube coming to a cone shape at the top and having the ordinary bat-wing burner opening. The purpose of the slit in the side was wholly for the purpose of controlling the amount, or supply, of gas that the burner took, without any reference to carburation of the same. The screwing down of outer tube would result in the pressing of the cone-shaped top of the outer tube, or burner, upon the upper and outer edge of the inner tube so as to close the slit and thereby cut down the supply of the gas flow. The screwing up of this

outer tube would allow the gas slit in the inner tube to spread and furnish a larger quantity of gas. There was no intention to control the gas supply at the base of the burner with the view of in any way furnishing carburated air or in any way changing the effect of the gas from its supply source to the tip. Any such result, if any existed, was merely incidental. The Court held this not to be an anticipation of the gas burner designed with perforations at its base, with means of controlling the supply at the base, so as to furnish the proper amount of carburated gas at the burner tip, it being found that the old slit gas burner, when in perfect working condition, had no discharge of gas near the base, and none was intended.

A comparison of this case with the devices now under consideration shows the inaptness of the citation. Gilchrist designates the object of his invention as follows:

“It is the object of this invention to provide a pulley which will contain a considerable quantity of lubricant and feed the same automatically and slowly upon the bearing pin of the pulley.”

This was certainly the express purpose of the oil reservoir in the side of the Butters' pulley block, the Labadie pulley block, the Ludford pulley block, the Gilley pulley block and the Morgan pulley block. Butters describes his improvement as relating to means to provide a lubricant for moving parts subject to strain that will be durable and not require frequent renewal,

so that the pulleys will not be liable to get dry or rusty, or be unduly subject to wear. What was provided in the Gilchrist pulley block which was not actually provided in the Butters pulley block? A like comparison with the other exhibits shows that the very object of the oil reservoir could be for no other purpose than to provide a considerable quantity of lubricant to feed automatically and slowly upon the bearing of the pulley block and give the same the exact advantages which were sought to be accomplished in the Gilchrist pulley block.

The description of the Morgan patent, referred to in this case, is certainly free from any ambiguity which would make it impossible for one skilled in the art of making pulley blocks to make this pulley block with an oil reservoir in the side, embodying the same law, or mode of operation, disclosed by the Gilchrist patent. The description of the Morgan patent is certainly as distinct and clear as the description of the English patent to John Henry Johnson, referred to in the foregoing case of *Cohn v. U. S. Corset Co.*, so that the rule laid down in that case could be admitted without detriment to the defendant in this suit concerning the effect which the Morgan patent and other exhibits have upon the validity of the Gilchrist patent.

The authorities hereinbefore considered are comprehensive and complete on the question of what constitutes the prior art and the necessity of testing the

question of invention by all that is found in the prior art. The testimony and exhibits introduced in the trial Court, and as shown by the record now in this Court, are of such a clear and decisive nature, and these exhibits and publications speak so strongly for themselves, that I feel it is unnecessary to give any consideration to the questions as treated and considered on pages 71 to 90 of appellant's brief.

Appellee's case is not dependent upon vague or ambiguous publications, nor upon uncertain testimony concerning the prior art. However, as stated by Justice Reed in the case of *Railroad Supply Co. v. Elyria Iron Supply Co.*, 61 L. Ed. (U. S.) at page 1142:

"Prior devices described in letters patent, though not used practically, and needing alterations to adapt them to practical use, are anticipations."

(Citing a great number of cases.)

It is quite probable that much of the testimony of expert witnesses could be dispensed with. I believe I am in harmony with the theory that expert witnesses should be used sparingly. However, the expert witnesses were in Court and counsel for complainant probably occupied as much time in examining and cross examining these expert witnesses as did counsel for defendant.

However, the evidence, exhibits and publications of the defendant are of such a clear and decisive nature that they will speak for themselves no matter what may be said as to the constructions placed upon them by the experts.

The concluding cases cited by counsel on page 99 of his brief are inapt and not in point for the following reasons:

In the case of *Auto Vacuum Freezer Co. v. Sexton Co.*, 239 Fed. 398, the patentee was a pioneer and while he had created a simple device in the form of an ice cream freezer, the same had gone into extensive commercial use and is said to have created a new industry. There were no questions of prior use nor anticipations by prior patents or publications. It was simply a question as to whether or not the patentee as a pioneer had shown sufficient novelty and ingenuity in his alleged invention to be rewarded by the grant of a patent. Under such circumstances the public was receiving something new and was being deprived of nothing which had previously belong to it, and the Court was probably correct in sustaining the patent.

In the present case the appellant has created nothing new. He has not devised a new mode of operation nor a single new element to be embodied in a combination machine operating under an old mode of operation. He was preceded as to all by not only patents and publications but also by prior use, and he therefore stands more in the position of the patentee in the case of *Grinnell Washington Machine Co. v E. John Co.*, 247 U. S. 426, 62 L. Ed. 1196, who brought together the combination of the wringer and the washing machine operating as a unitary device. In fact, he has displayed much less invention than did the patentee in the last mentioned case, and in that case

the United States Supreme Court, speaking through Justice Day, used the following language:

“Phillips may have produced a more convenient and economical mechanism than others who preceded him, but superiority does not make an aggregation patentable. *Office Specialty Mfg. Co. v. Fenton Metallic Mfg. Co. supra.* The assemblage of the old elements and their operation in the manner indicated may save time, and the mechanism may meet with a readier sale than other similar devices, but these things may result from mechanical skill and commercial enterprise, and do not necessarily involve invention.”

The patent was, therefore, declared invalid for want of invention.

In the case of *Topliff v. Topliff*, 145 U. S. 156, the combination of the patent under consideration pertained to a spring equalizer whereby a transverse rods extending from the spring on one side of the carriage to the spring on the other side and having their axis in the links at the end of the springs, and arms set off or extending therefrom and, attached to the springs at each side in such a manner that if the load was placed on one side of the buggy the depression of the spring would turn the rod on its axis and cause an equal depression of the springs on the other side of the buggy.

The device relied upon as an anticipation of this patent was not intended as a spring equalizer and was not provided with an axis attached to the springs

so as to work as an equalizer, but on the contrary, the device comprised rods extending from one spring to the other in a manner and for the purpose of protecting the carriage and springs against the wracking or diagonal strains to the springs and buggy. The same could not operate as a spring equalizer of the nature in the patent under consideration without being reconstructed and modified for that purpose.

On the other hand, as to all of the oil reservoir blocks which the defendant introduced in this case, as well as the patents and publications, including the Morgan block, the very purpose of the oil reservoir provided in said blocks was the same as the purpose expressed by the appellant in his patent, as his purpose for providing the same, and these blocks embody the same mode of operation.

The case of *Klein v. Russell*, 19 Wall. 433, pertained to a process for treating lamb or sheep skins and is not sufficiently analogous to call for consideration in connection with this case.

The case of *Columbia Wire Rope Co. v. Kokomo*, 143 Fed. 116, is of no importance as an authority in this case for the reason that devices of the prior art are not explained and the fact was practically conceded by appellee's expert that the combination in the patent is both new and useful and within the objects of the patent law.

The case is devoted principally to the question of defendant's infringement. However, the case is of

some interest by reason of the fact that the modifications and differences existing between defendant's device and the complainant's device in that case were considerable and the defendant was held to have infringed.

Under the rule—"that which infringes if later would anticipate if earlier"—the case could be construed as an authority for showing that the appellant in this case had been anticipated.

The case of *Keystone v. Adams*, 151 U. S. 139, pertains to the corn sheller patent which has been heretofore considered. The patentee in this case was shown to have introduced a new mode of operation in his machine.

Appellant's title as an inventor in this case is not nearly as good as that of the owner of the Voightman patent No. 600,186, for fire-proof window, reported in 133 Fed. 934. In the last mentioned case the patentee had brought together an automatically closing sash consisting of the combination of a fire-proof casing, a fire-proof sash pivoted therein with a retaining chain having a fusible link so that when subjected to heat the fuse would melt and the window would automatically close. The patent was determined to cover a mere aggregation. On page 936 we find the case of *National Cash Register Co. v. American Cash Register Co.*, 53 Fed. 371 (cited on page 19 of appellant's brief), embodied in the following words:

“That a combination, to be patentable, must produce a new and useful result as the product of the combination, and not a mere aggregation of several results, each the complete result of one of the combined elements. (National Cash Register Co. v. American Cash Register Co., 53 Fed. 371, 3 C. C. A. 559).”

Expanded Metal Company v .Bradford, 214 U. S. 366:

This suit involves the patentability of a process and machine by which expanded metal, or what is sometimes termed “metal lath,” is made. Metal had previously been slit and then stretched so as to make openings. This process was slow and did not give perfect uniformity to the links or openings, and the stretching of the material for making the openings would shorten the sheet of metal in the direction in which the slits ran. The patented process and machine involved in this case stretched each link or side of the slit as soon as it was cut by pressing down the portion or strip, just after cutting, in a right angle direction from the plane of the sheet yet uncut. This process was much faster than any previous process, and the pressing down of each portion immediately after the cutting thereof, while the remainder of the sheet was still uncut, made each link or hole of exactly the same uniform shape and size and stretched each link to the same extent, so that the finished product would be uniform and would also retain the same width as the sheet from which it was made.

On page 379 there appears the following language of the court:

“If all that Golding did was to show a method of *simultaneous cutting* and stretching metal, the examiner was doubtless right in holding it to have been anticipated by the former inventions, notably the patent to Ohl, No. 475,700, and in a degree, in the previous patents to Golding and to Golding and Durkee.

“But the patent in suit embraced in the claim allowed, shows more than a mere method of making open meshes by simultaneously cutting and stretching metal. It shows a method by which the metal is first cut and stretched in the manner indicated to make the half diamond, and then a second operation, *co-ordinating with the first*, and completing the mesh by the manner in which it is performed in connection with the first. It is the result of the two operations combined which produces the new and useful result covered by the claim allowed in the Patent Office, and which, when read in connection with the specifications, shows substantial improvement in the art of making expanded metal work.”

Diamond Rubber Co. v. Consolidated Tire Co.,
220 U. S., 423:

In the case of Diamond Rubber Co. v. Consolidated Tire Co., 220 U. S., 423, the Court had under consideration a patented wheel, or tire, embodying a felly having a strip of metal or channel iron fitted thereto in such a way as to receive the rubber tire and retain it on the

wheel, but still allow the same to creep or spring from its fixed position, after which it would readily reseal in the channel of the felly.

This channel had a flat central portion and flanges angling outwardly to each side of the felly. The tire was provided with wires running through the same so as to prevent the springing of the tire to such an extent as to come off the wheel. The inner surface of the tire was similar in shape to the channel iron in which it was seated, but angled inwardly from the flanges of the channel iron so that the angles of each side of the rubber tire formed at the point where the tire changed from an outward angle to an inward angle was below the edges of the flanges of the channel iron. It was this particular formation which gave to the tire its resealing capacity. The outwardly projecting flanges were such as to allow the tire to creep or spring to one side, after which it would immediately reseal itself by reason of the flanges of the channel converging toward each other in the direction of the hub of the wheel.

All previous rubber tires were either cemented fixedly to the fellys of the wheels or were attached in channels in which the flanges were inset, thereby forming clinchers which held the tires fixedly in place so that they were subject to greater damage by coming in contact with rocks or other obstructions on the road.

On page 443 appears the following language of the Court:

“The tire company gives a definition of the ‘something’ as tipping and resealing power. The rubber

company earnestly denies the existence of the power, and, as we have seen, the Court of Appeals for the sixth and second circuits divided in opinion on its existence. We think such power is possessed by the tire. This is shown by the evidence and was shown at the oral argument. *And it is the result of something more than each element acting separately. It is not the result alone of the iron channel with diverging sides, nor alone of the retaining bands or the rubber. They each have uses and perform them to an end different from the effect of either, and they must have been designed to such end, contrived to exactly produce it."*

While the foregoing case was sufficiently close so that two circuits had differed upon the question of fact as to whether or not there was a correlation which produced some new result so as to be something more than a mere sum of the separate functions of the elements of the combination, it was only after the appellate court had found upon the question of fact that there was a new result or mode of functioning by the co-action of the separate elements that it finally determined the patent to have validity.

It was the same application of law which runs through all of the cases, namely: Before the Court can find that a patented combination is valid, it must find as a question of fact that there is some new correlation between the elements, producing something more than a mere sum of the separate functions of elements found in the prior art.

ARGUMENT.

In a case of this nature it is always difficult to determine just how to arrange a brief so as to make it most useful to the Court. The number of legal questions which have been raised in this controversy, and which have been dealt with in this brief, are so numerous, the Court's time is so precious and the number of these various questions upon which the Court is undoubtedly well informed is so large, that I felt it advisable to treat in proper sub-divisions the principal legal questions under the head of "Points and Authorities," without intermingling therewith much of what can be strictly considered "Argument," or reference to the facts as disclosed by the record in this case.

The alphabetical index of cases and the topical index to points and authorities will enable the Court to quickly turn to those portions of the brief with which it may be most vitally concerned. However, I trust that the portion of this brief which is denominated "Argument" may also prove of some assistance.

In the first place, it should always be borne in mind that invention is a question of fact which must be determined by first taking into consideration the prior state of the art, both as to all patents and publications and as to all devices which have been in actual use, after which the question of invention is to be determined by the application of well established rules of law.

The order in which the rules of law are applied in a given case substantially affects the amount of work which may be required to finally arrive at a determination of the issues involved.

For example, if one were to study the patent without first giving due consideration to the prior state of the art he would necessarily need to consider whether or not certain devices or combinations were the result of the exercise of the inventive faculty or displayed a mere exercise of mechanical skill. These questions may be greatly reduced in number or wholly eliminated from consideration upon finding that like devices or combinations were part of the prior art.

Then again, it is not unusual to find a device so described in a patent specification as to cause one to feel that the same discloses true invention, but upon turning to the claims of the patent it may readily be seen that most of that which was considered as disclosing invention may have been recognized by the patentee to have been old in the prior art, or may have been dedicated to the public by not being properly covered by the claims as drawn. (See pages 23, 24, 27, 28, 108, 113, 114 and 115 of this brief).

In the process of applying rules and thereby eliminating questions which it may be found unnecessary to consider, the rule concerning the prima facie presumption of the validity of a patent by reason of its issuance and the rule that the commercial success of an article may some times be considered, are the very last rules which should be applied by the Court. They should never be resorted to unless, after applying all

of the other tests of invention, the Court still feels that the patent may disclose invention, and does not know which way to decide the question. It is then, and then only, that the Court is authorized to give any weight to these presumptions. (See pages 30 to 36 of this brief). These presumptions are mere rules of evidence which cannot usurp the judgment of the Court. (See page 33 of this brief). As is well stated in the quotation on page 34 of this brief, these presumptions "cannot be used to resolve the doubt as well as to create it, else every useful and successful thing would be patentable." On the contrary, as is shown on pages 19, 29, 108, 113, 114 and 115 of this brief, the Court should ever be alert to protect the rights of the public against patent monopoly, and within the language of *Atlantic Works v. Brady* (page 19 of this brief), should not assist speculative schemers "to watch the advancing wave of improvement and gather its foam in the form of patented monopolies, which enable them to lay a heavy tax upon the industry of the country without contributing anything to the real advancement of the arts."

In this case any presumption which might otherwise have been indulged in to sustain the validity of the complainant's patents is wholly overcome and destroyed by the file wrappers of these patents, when read in the face of the prior state of the art. (See pages 30 to 33 of this brief).

In patent No. 977,613 the patentee has stated in the specification that he has invented a new and useful pulley block, the object of which invention, as

pointed out by the patentee is "to provide a pulley which will contain a considerable quantity of lubricant and feed the same, automatically and slowly, upon the bearing pin of the pulley" and also "to provide a pulley, the bearing pin of which is adequately protected against dirt and dust." (See lines 24 to 28 and 33 to 35, page 1, of specification).

By turning to pages 84 and 85 of this brief it will be found that a pulley-block is a simple machine, and further that the patent law makes a distinction between a machine and an improvement in a machine. It will also be found that "in the eye of the patent law a machine is an artificial organism governed by a permanent artificial rule of action," that "the unity of a machine also resides in the same rule of action," and that "whether composed of single organisms or of several subordinate organisms, as a machine it is a unit, and is destroyed whenever any change, addition, or withdrawal of its elements results in the alteration of its structural law," but that "while this law remains undisturbed, any such change, addition or subtraction is at the most an improvement on the old machine, however marked may be the effect produced upon its shape or usefulness."

It may be admitted that if the appellant herein was the first person to devise a pulley-block provided with a chamber for the holding of oil together with means for conveying said oil from the chamber to the bearing of the pulley, that he would have been the inventor of a new pulley-block, as there would have been a new mode of operation disclosed by the means

be based upon the invention of a new and useful pulley-block. (See first two quotations from *Griest Mfg. Co. v. Parsons*, 125 Fed. 116, 119, page 44 of this brief; quotations from *West Coast Safety Faucet Co. v. Jackson Brewing Co.*, and *Union Edge Setter Co. v. Keath*, page 53 of this brief; quotation from *Ft. Pitt Supply Co. v. Ireland & Matthews Mfg. Co.*, last paragraph, page 74 of this brief; quotations from *Union Paper Bag Machine Co. v. Murphy*, page 82 of this brief; quotation from *Smith v. Nichols*, pages 83 and 84 of this brief).

Claim 1 is the broadest of the three claims and contains all of the elements pertaining to the lubrication of the pulley block.

The Court is, therefore, immediately confronted with the question as to whether or not complainant's patent is not void upon its face as to everything, excepting one claim for a new and useful pulley block, for the reason that complainant has not complied with Sec. 4888 R. S., in that he has failed to "particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery." (See page 18 of this brief, also authorities on pages 109, 110, 113, 114 and 115 of this brief).

In the case of *Seymour v. Osbourne*, 11 Wall. 516 (cited in appellant's brief, we find the following language on this subject:

"When the invention is an entire machine, the claim is sufficient if it is clearly co-extensive with the machine; and where the invention is a part of the

for lubricating the pulley-block; but the matter of adequately protecting the bearing pin of the pulley against dirt and dust could not be the subject of a patent for a new machine or a new pulley-block, as there would be no new mode of operation. However, it might be the subject of a patent for an improvement in a pulley-block (or machine), by reason of the new or added element of a dust guard, providing no such device could be found in the prior art, and provided, further, that the adding of such dust guard displayed something more than the mere development or improvement of the device such as would be provided by a mechanic skilled in the art upon finding from experience that difficulty was encountered by the way of dust and dirt getting into the bearing.

By now turning to the claims in issue as analyzed on pages 7, 8 and 9 of this brief, we find that there is no law or mode of operation set forth in any of these claims other than what may be found in the most ancient form of a simple pulley-block except that which pertains to the lubrication of the pulley block.

The same means are employed and the same mode of operation is utilized as to the lubrication of the pulley in each of the three claims in issue. As the same mode of operation is set forth in each of the three claims in issue, it is impossible for all three of these claims to be valid claims for a new and useful pulley-block and the patent, therefore, discloses upon its face that there can be but one claim which could

machine or manufacture, that part must be clearly indicated in the claim which covers it."

If each of the three claims in issue disclosed a new and useful pulley-block embodying a new mode of operation different from what could be found in the prior art or in either of the other claims, the language of these claims might be considered sufficient under the statute and the authorities cited. It would then be all of the elements of the pulley-block as a unitary device which the patentee would be claiming as his invention.

All of these claims seem to have been drawn upon the theory that it was only necessary to enumerate the separate elements of the combination and then leave it to the public to find out wherein the improvement had been made, but this is not the law and under the authorities hereinabove referred to the complainant cannot now ask the Court to reconstruct his claims for the purpose of giving them validity.

Now passing to the question as to whether or not any of the claims disclose a new and useful pulley-block (machine) and bearing in mind that the complete mode of operation is the same in each of these claims, and bearing in mind that the only thing upon the face of the claims themselves which could mark them as disclosing a new and useful pulley-block would be that of providing a chamber for the holding of lubricant which could be fed therefrom to the bearing pin, we may then turn to the prior art to see whether or not there is anything new in the mode of operation so disclosed in these claims.

By defendant's Exhibits C and D and the testimony of Mallory, Borquist, Geary, Taylor and Younie, referred to on page 2 of the "Statement of Facts," the evidence was undisputed and overwhelming to show that pulley-blocks provided with oil reservoirs in the form of elbows, elbow extension reservoirs and grease cups combined with all of the other elements disclosed in each of the three claims in issue had been generally manufactured, sold and used in the Pacific Northwest for at least three years prior to the time that the complainant applied for his patent, and that many of these pulley-blocks had been in general use since 1903.

By defendant's Exhibit KK it is shown that one Henry Smith obtained U. S. patent No. 115,248 in May, 1871, upon a pulley-block provided with a lubricant chamber, and that even in this patent Smith disclaims the invention of a self-lubricating pulley-block broadly.

Defendant's Exhibit 4C, being for U. S. patent No. 349,691 issued to H. Butters September 28, 1886, and defendant's Exhibit OO, being U. S. patent No. 390,341 issued to Brown October 2, 1888, each discloses a self-lubricating pulley block.

Defendant's Exhibit QQ also discloses that U. S. patent No. 513,067 was issued to James R. Labadie January 16, 1894, in which there is disclosed every element of each of the claims of complainant's patent No. 977,613 which are in issue, excepting as to the element of a detachable top which is shown to be considerably different in structure from that covered

by the Gilchrist claims. And after introduction of the various exhibits, including the patents set forth on pages 3 and 4 of this brief, the controversy was finally narrowed down to the single issue of whether or not the one element of the side provided with an interior oil chamber as described in the Gilchrist claims would be sufficient to give validity to the claims in appellant's patent.

As heretofore set forth, the circumstances are such that there could be no patent for a new pulley-block as the prior art discloses that the mode of operation described in the claims was old at the time of appellant's application for patent.

The appellant himself did not take the witness stand and there was, therefore, no showing which would carry the date of invention back prior to the date of the application for the patent.

In view of the fact that the patentee has claimed a new pulley-block, and in view of the laws hereinbefore referred to concerning the distinction between new devices and improved devices, and concerning the necessity of specifically setting forth the exact improvement where an improvement only is claimed, it is respectfully submitted that the Court cannot reconstruct the specifications and claims of appellant's patent for the purpose of giving it validity, and that the Court would be justified in declaring the patent No. 977,613 invalid upon this showing alone.

It is contended by counsel for appellant that the problem or task which the complainant had to solve

was that of providing a pulley-block which would withstand the strains to which it would be subjected in logging operations, and also provide an adequate chamber for containing a considerable quantity of lubricant and feed it upon the bearing pin of the pulley-block. It is then contended that the patentee solved this problem by providing a pulley-block with an interior oil chamber in one of its sides, cast in one integral piece in such a manner as to make a stronger side without using any more metal, and at the same time avoid the seepage of oil through sutures of the chamber.

Counsel for appellant then point to the commercial success of the article and argue that they have at least disclosed a doubtful situation, and that by reason of the issuance of the patent and the commercial success of the article, the Court should construe this doubt in appellant's favor and declare the patent valid.

Attention has heretofore been called to the fact that the specification of patent No. 977,613 indicates that the patentee claims to be the inventor of a new and useful pulley-block, and does not confine the claim of the invention to the improvement of a pulley-block. As has heretofore been stated, the claims also seem to have been drawn upon the theory that each of the claims covered a new pulley-block (or machine) as there is no attempt to point out the particular improvement.

If each of the claims in issue described a new and useful pulley-block, in the sense that a new mode of operation was therein set forth, the mere enumera-

tion of the various elements of the combination would be sufficient without particularly pointing out wherein the pulley-block had been improved. But as stated in Robinson on Patents, Vol. 1. page 296 (heretofore referred to) the law which requires particularity and distinctness in the claims of a patent applies with special force to claims for an improvement.

The contentions heretofore referred to which are advanced by appellant's counsel concerning the presumption of utility and invention from the commercial success of the device, would be asking the Court to disregard the well-established rules of law for testing the question of invention. It would be asking the Court not only to disregard the separate consideration of each of the claims but to disregard the claims entirely and take into consideration only the device as actually manufactured and placed upon the market.

One of the greatest dangers in giving any consideration whatever to the commercial success of an article, is that the Court may overlook the fact that it is something other than that which is covered by a claim of the patent which accounts for the commercial success of an article. It would be hard to find a better illustration than what is afforded by the contention of counsel for appellant in this very case. Counsel contend that the patentee solved the problem of providing a pulley-block with a side and oil chamber cast in one integral piece so as to withstand the strains and avoid the seeping of oil through sutures, but there is not one word in any of the claims to indicate that this was the subject of the grant in the

patent. Within the language of the case of *White v. Dunbar*, 119 U. S. 51, quoted from on page 72 of this brief, counsel for appellant would have the Court make out of the claim a "nose of wax" and then twist it even more than by first considering the claim as a claim for a new device and then as a claim for an improvement in an old device; counsel would have the Court not only make of the claim a "nose of wax" to be twisted and turned to suit the convenience of this case; they would also require the Court to sever entirely the "nose of wax," forget the claims of the patent, and place the "nose" upon the article as manufactured.

Consideration will now be given to each of the claims separately for the purpose of ascertaining just what exclusive rights each of the claims purports to grant to the patentee.

Taking up first Claim 1, we find the same to contain a mere enumeration of elements without reference to any particular improvement. Turning to the analysis of this claim as shown on page 8 of this brief, we find that elements 1, 3, 3a and 4 are elementary or simple elements. The Court will take judicial knowledge of the fact that each of these elements is old in the prior art and were contained in the most ancient and simple form of pulley functioning in the same manner.

There is no new mode of operation disclosed in this combination. The sides hold the bearing pin and hold the sheave in place. The bearing pin holds the sides

together and serves as an axis upon which the sheave turns, and the sheave is journaled for rotation upon this pin between the sides in the same manner that sheaves have always operated. The pulley-block as a unitary article performs but one function,—that of guiding or directing a line or cable, in exactly the same manner as the simplest form of pulley-block which was ever constructed.

The only points of distinction between this pulley-block and the most ancient and crude form of pulley-block which was ever manufactured, is that means have been provided for retaining a quantity of oil which will feed automatically upon the bearing pin. As has been previously shown, this was old in the prior art. The law of lubrication has in no way been changed from what is shown by the simplest form of an elbow oil reservoir from which oil would feed through an axial opening of the pin and thence through a radial opening to the bearing surface of the pin and sheave in the same manner as in defendant's Exhibits C and D and like pulley-blocks which are shown to have been in general use in the Pacific Northwest since 1903.

It therefore becomes certain that Claim 1 cannot describe a new and useful pulley-block, and can at best describe nothing more than an improvement in a pulley-block, by which improvement there has been no change in the mode or law of operation, but has merely been an improvement in one of the parts; but, as has been previously stated, there has been no claim for an improvement in one of its parts, and no such improvement has been particularly set forth.

For the purpose of argument only, let us take for granted that Claim 1 was intended as a claim for an

improvement in a pulley-block, instead of a claim for a new pulley-block, and by again examining the analysis of Claim 1, we find the only change of elements from that of the most ancient form of pulley-blocks to be in elements 2, 2a, 3b and 3c. Element 2 covers an interior oil chamber in one of the sides, but it does not cover this element broadly, in that it covers it only with the useless limitation or qualification of an inlet to said chamber adjacent the top of the block. This limitation may have been included by the patentee by reason of his familiarity with the elbow reservoir which was not much higher than its diameter, so that the opening to this reservoir, while being at the top of the reservoir, would not be adjacent the top of the block. However, the qualifications or limitations upon element 3, that of 3b—"having an axial opening communicating with the chamber"—and 3c—"and extending through the side wall of the pin"—are found duplicated exactly in the same relation to the other elements in defendant's Exhibit C and D as they are found in this claim. This leaves only element 2—"an interior oil chamber in one of the sides"—to be found in the prior art. This element is found more strictly within the definition of an interior oil chamber in the Labadie, Butters and Ludford patents, defendant's Exhibits QQ, 4C and 3D, than in appellant's own device.

Counsel for appellant answer these references by saying that all of the elements are not found combined in one single device. Appellee's answer to this objection is that it is not necessary to find all of the

elements in a single device of the prior art, unless the claim covers a new and distinctive machine embodying a new law or mode of operation; and even then it is not necessary to find all of the elements in a single device, for it required nothing more than mechanical skill on the part of one skilled in the particular art, to arrange the particular combination, having before him all of the devices of the prior art from which to make his selections. (See pages 53 to 59 of this brief.)

In addition to this claim, appellee contends that the Morgan and Nixon patent, defendant's Exhibits 3-O and BB, embodies all of the elements of Claim 1 in exactly the same combination, following exactly the same mode of operation, and performing exactly the same functions, so that the same may be said to read "letter perfect" upon Claim 1 of appellant's patent No. 977,613.

For the convenience of the Court, analysis of Claim 1 is again set forth, with the reference numerals of appellant's patent placed after each element, and immediately after these references to each of the elements is placed the reference to the like part in the Morgan patent.

Elements:	Gilchrist	Morgan
1. Sides	(1 & 2)	(A)
2. An interior oil chamber in one of the sides.....	(4)	(j ¹)
(a) an inlet to said cham- ber adjacent the top of the block	(5)	(j ²)
3. A bearing pin.....	(24)	(C)

- (a) terminally mounted in
the sides (18 & 19) (c¹ and c²)
- (b) and having an axial
opening communicating
with the chamber (2), (27) (shown but
not design-
ated by
letter.)
- (c) and extending through
the side wall of the pin. (28) (c³)
- 4. A sheave journaled for ro-
tation upon the pin be-
tween the sides..... (20) (E)

On the defendant's Exhibit BB each of the reference letters as used in the specification and drawings of the Morgan patent are placed upon the drawing in black ink, while on a line with each of these elements there is placed in red the figures which represent like parts of the Gilchrist device.

In each of these devices the oil is introduced into the chamber through an opening adjacent the top of the block and feeds from this chamber directly through an axial opening in the pin, and thence through a radial opening to the bearing surface of the pin by virtue of the law of gravity and the draw on the oil by the rotation of the sheave.

Counsel for appellant contend that as it is claimed the Morgan patent is the best reference the Court should not be called upon to consider any of the other references.

I am inclined to agree with counsel for complainant to this extent, namely: that a careful examination of the analysis given, together with defendant's Exhibit BB, and the proper application of the well established rules of law as set forth in this brief, should make it unnecessary for the Court to consider any of the other exhibits, as the law is well settled that the claim of the patent is the measure of the invention (see pages 23, 24, 27, 28, 108, 113, 114 and 115). It is only for the purpose of meeting the other objections made by counsel for appellant, which objections have no sound foundation in law, that it is deemed advisable to refer to some of the other exhibits introduced by defendant, by which it may be shown that even though the basis of counsels' theory is unsound, their objections are also fully met on their own unsound basis.

Counsel for appellant lay great emphasis upon the word "interior" and seem to feel that the oil chamber of the Morgan block is not an interior chamber, for the reason that the drawings indicate that the chamber is riveted to the side. There is nothing in the location of the chamber, either in the claims or the drawings of the Gilchrist patent, which makes it any more of an interior chamber than the chamber of the Morgan block, unless it is that the one is cast while the other is riveted, so that the one is interior in the sense that it is within one solid piece of metal while the other is within the enclosure formed by two pieces of metal being riveted together. That the oil chamber of the Gilchrist patent extends or protrudes beyond the normal

outer surface of the side is plainly shown by both Fig. 1 and Fig. 3 of the drawings, and as described by the express language of the specification. The chamber of the Morgan block does not extend any further beyond the normal side than the chamber of the Gilchrist block. It is right here that counsel for appellant would have the Court overlook the fact that the claim of the Gilchrist patent does not confine the oil chamber to a chamber being made in one integral casting formed within the side; a chamber of the same outlines and proportions riveted to the side would be within the claims of the Gilchrist patent as truly as would the chamber cast integrally with the side. Then again, there is nothing in the claims of the Morgan patent which confine the reservoir to one which is riveted to the side, and a side and reservoir formed of one integral piece would also read within the claims of the Morgan patent, as well as a block side with the chamber riveted thereon.

But even if the Court should follow the trail which counsel for appellant would so graciously blaze, it would still find obstructions which counsel are unable to remove, for if counsel were to ask the Court to disregard the Ludford, Labadie, Gilley and Butters patents, defendant's Exhibits 3-D, ZZ, QQ, 4-C, EE and CC, as disclosing block sides with interior oil chambers, it would be like asking the Court to partake of the fruit which it would find on the thistles growing beside the trail which counsel have thus blazed.

Having thus found that the mode of operation is the same in the Gilchrist pulley-block as in the Morgan

pulley block, can it be logically contended that a man skilled in the art of making pulley-blocks, and having before him all of these exhibits and having pointed out to him the weaknesses of each of these blocks, could not have made the Gilchrist combination without the exercise of inventive faculty?

Unfortunately, the appellant did not go upon the stand, and no opportunity was afforded to cross-examine him for the purpose of determining as to whether or not he had before him all of the devices of the prior art. We may, therefore, be charitable enough to say that the complainant may have thought that he was a true inventor and may have exercised the inventive quality. But this would not give validity to his patents. (See pages 107 and 108 of this brief.) Taking for granted that the patentee may have been unfortunate in some of the language which has been selected, the Court cannot be lenient with the complainant for this reason, as under the patent law he is conclusively presumed to have dedicated to the public all which is not claimed, (see pages 108 to 116 of this brief) and is conclusively presumed to have had before him all of the devices of the prior art (see pages 107 and 108 of this brief). The Court cannot reconstruct the claims for the patentee (see pages 23, 24, 27, 28, 108, 113, 114 and 115 of this brief).

Let us suppose that a logger came into a pulley-block factory with a pulley-block made according to the Morgan specification, a pulley-block made according to the Ludford specification, a pulley-block made ac-

cording to the Labadie specification, a pulley-block according to the Butters specification, and a pulley-block of the design disclosed by defendant's Exhibit I, and stated that he wished to have a new pulley-block designed embodying the best features of these four pulley-blocks; that he liked the general appearance and mode of operation of the Morgan block, but that the oil sometimes seeped through the sutures of the chamber, by reason of some of the rivets having been loosened; and that he liked the threaded and shouldered pin of the Labadie block and as used in defendant's Exhibit I; that no oil had ever leaked from the chamber of the Ludford, Butters or Labadie pulley-blocks; and that he would like to have a pulley-block retaining the mode of operation as disclosed in the Morgan block but embodying a side cast in one integral piece and containing the oil chamber within the same similar to that shown in the Ludford or Butters blocks, and provided with a pin such as is shown in the Labadie blocks, defendant's Exhibit CC, and in the block shown in defendant's Exhibit I. We will also suppose that all of these pulley-blocks had been made in this one factory. Under these circumstances, can it be logically contended that it would have required more than mechanical skill to have made a pulley-block embodying the general mode of lubrication as disclosed in the Morgan block, but changing the oil reservoir to one provided within a cast side and using a pin such as is used in the Labadie or Butters block and in the block shown in defendant's Exhibit I?

It is defendant's contention, first, that the side

with an interior oil chamber cast in one integral piece is not covered by the patent claim, and therefore cannot be considered by the Court under the rule hereinbefore stated,—“that the claim measures the invention”; (see pages 23, 24 and 28 of this brief); second, a side with an interior reservoir cast in one integral piece could not be the subject of invention, as it was old in the prior art and it does not involve invention to select and bring together in one combination old elements without changing the mode of operation; (see pages 40 to 52, and 60 to 62 of this brief); third, that even though the prior art did not disclose a side containing an oil reservoir cast in one integral piece, it could not be the subject of invention to cast this side in one piece; (see pages 62 to 71 of this brief).

Claim 1 may therefore be said to be invalid for the following distinct and independent reasons:

1. That said claim is invalid because its subject matter in view of the prior state of the art did not require the exercise of invention to produce it.

2. That it is not invention to bring together old devices into a machine without producing any new mode of operation. (See pages 40 to 52 of this brief.)

3. That the assemblage of elements enumerated in said claim is not patentable because it is an aggregation and not a true combination. (See pages 40 to 71 of this brief.)

4. That the assemblage of elements enumerated in said claim is wholly lacking in patentable novelty,

being anticipated both collectively and severally in the prior art.

5. That the assemblage of elements enumerated in said claim, even if it were a true combination, would not constitute a new machine in the eye of the patent law, but only an improvement of an old machine, and that as an attempt to define an alleged improvement of old machine the claim is void because it fails to identify any improvement as required by Sec. 4888, R. S. (See pages 71 to 85 and 113 to 116 of this brief.)

It is felt that the evidence as to the state of the prior art and the authorities heretofore referred to are such that the Court should not have the shadow of a doubt as to the invalidity of Claim 1.

Counsel for appellant have urged that there is that shadow of doubt, and it is on a shadow of a doubt that they hope to have the patent sustained, by asking the Court to declare it to be valid because the Patent Office has issued the patent, and because a block which has been manufactured by the patentee embodying some of the elements of the claims of the patent has become a commercial success. Counsel for appellant realize that their case is a weak one, and they are making a diligent effort to create a shadow of a doubt. That counsel themselves did not have a shadow of a doubt as to the invalidity of Claim 1 is indicated by the fact that upon commencing this suit Claim 1 was not included.

The evidence shows that appellant was furnished with a reference to the Morgan patent in 1915 and ap-

pellant's counsel evidently were convinced in their own minds that the Morgan patent was a complete anticipation of Claim 1.

Claims 4 and 5 are mere detailed limitations upon Claim 1. Claim 1 is the only claim concerning which it could be logically contended that defendant's pulley-blocks infringe, and counsel certainly would not have neglected to include Claim 1 as a basis for the suit in the first instance had they felt that there was any possibility of sustaining the claim.

It is logical to believe that, after preparation of this case for trial and becoming familiar with the fact that all the detailed limitations of Claims 4 and 5 were not embodied in the defendant's pulley-blocks, and that they were also anticipated by the prior art, counsel then came to the conclusion that there was nothing left upon which to base the validity of the patent, other than the commercial success of the article combined with the *prima facie* presumption of invention arising from the issuance of the patent itself; and that, having arrived at this conclusion, they decided to amend their complaint and include therein Claim 1 of patent No. 977,613; for, if they could convince the Court that the claims themselves should not measure the invention, and could keep uppermost in the mind of the Court their theory concerning the commercial success of oil reservoir blocks, it might be possible to have the Court declare the patent to be valid. Upon this theory Claim 1 could be included just as well as Claims 4 and 5.

I am in no way criticising counsel for their action in this respect; it was the logical thing to do; but it is worthy of consideration in that it indicates that complainant's counsel fully realize that all of the elements and functions of the Gilchrist patent were anticipated by the prior art and that they have given up hope of sustaining the patents unless the Court should measure the invention by something other than the claims themselves.

Counsel even introduced the file wrapper of patent No. 977,613 to show that this patent was granted by the Patent Office exactly as applied for without the citation of a single reference against it. Can it be that counsel expect the Court to believe that the Patent Office had considered the Morgan block, which reads letter perfect upon Claim 1 of this patent, and then allowed Claim 1 as drawn, without so much as a single reference to the Morgan patent? I cannot understand how such a presumption can be indulged in. The law is very well settled that when the file wrapper discloses that similar patents or devices of the prior art have not been cited, it must be considered that these prior devices and patents have been overlooked by the examiner, and within the language of the cases considered on pages 31 and 32 of this brief, this fact alone should be sufficient to destroy completely any *prima facie* presumption which might otherwise be indulged in by the Court as to the validity of the patents.

The commercial success of an article has never been considered a safe guide for the Court, (see pages 36 to 40 of this brief), but that phase of the case applies

equally as to all of the claims and will be taken up more fully after detailed discussion of each of the other claims.

Turning now to the analysis of Claim 4 on page 9 of this brief, it will be found that elements 1, 2, 2a, 3, 3b, 3c and 4 are all included in and covered by the analysis of Claim 1. Claim 4 is a mere restriction upon Claim 1, by reason of the limitations 1a, 5, 6 and 7, and the claim is therefore invalid for the reasons set forth below and numbered 1, 2, 3 and 5.

While Claim 1 does not state that the sides are parallel, the sides to all pulley-blocks, as shown by the prior art, are parallel.

Claim 4, therefore, embodies the following qualifications or limitations upon Claim 1, namely:

1a, which requires the parallel sides to have annular recesses in their adjacent faces,

3a, which requires the pins to be terminally threaded to engage the sides of the recessed portions thereof,

5, which requires the sheave to have oppositely disposed bosses adapted to fit closely but anti-frictionally in the recesses,

6, the pin having shoulders to engage the sides to prevent the same from binding upon the sheave, and

7, top removably connecting the sides above the sheave.

A block constructed with all the elements as set forth in Claim 4 would be used in exactly the same manner and would function exactly the same as a pulley-

block constructed as provided in Claim 1. The equivalents of all of these additional elements mentioned in Claim 4 would necessarily have to be used in Claim 1 in order to make a complete pulley-block, excepting that the block sides would not necessarily have to have annular recesses in their adjacent faces nor would they necessarily require oppositely disposed bosses unless there were annular recesses in the adjacent faces of the sides.

The effect of complainant's testimony concerning Claim 4 is merely to bolster up complainant's contention that a pulley-block having annular recesses in its sides and a sheave with oppositely disposed bosses adapted to fit closely therein is a better pulley-block as a longer bearing surface is thereby obtained, and a dust guard is provided to keep out dirt and dust, and that a removably connected top is more convenient; but none of the evidence tends to show that either of these elements operate any differently than they do in other pulley-blocks of the prior art, nor that there is any co-ordination or coaction induced between the elements so added by the presence of the remaining elements on the one hand nor between the remaining elements and the added elements on the other hand.

A few references will now be made to the prior art for the purpose of showing that each of these added elements or limitations was also old.

The block made by the Columbia Steel Works in 1907 and illustrated in defendant's Exhibit I contains the following elements of this claim: It has parallel sides with annular recesses in their adjacent faces and

as shown by the testimony (R. 59-63) the pin was terminally threaded to engage the sides in the recessed portions thereof; and the sheave was provided with oppositely disposed bosses adapted to fit closely but anti-frictionally in the recesses. In fact, it is advertised as the Dirt Proof Blocks. The pin has shoulders to engage the sides to prevent them from binding upon the sheave, and the top is removably connected with the sides above the sheave. The pulley-block, therefore, contains all of the additional elements or limitations mentioned in Claim 4 in the same combination, functioning in the same manner and producing the same result.

The only element which can possibly be considered as missing to prevent this block from being a complete embodiment of all of the elements in both Claims 1 and 4 is that there is no reservoir in the side of the block so that the capacity for holding oil is not so great in this block as it is in the Gilchrist block; but, as shown (R. 59-63) by the testimony, the pin has an axial opening and a cross-drill or hole from the axial opening to the bearing surface. A plug is placed in the end of the pin so that the pin itself acts as the oil reservoir and the oil feeds through the hole in the pin to the bearing surface in exactly the same way as in the Gilchrist block.

The block of the Vulcan Iron Works illustrated in defendant's Exhibit L and explained (R. 59-63) by the testimony likewise embodies the same elements in the same combination.

Attention is also directed to defendant's Exhibits N and GG, explained (R. 59-63) in the testimony, also to the Labadie patent No. 513,067, defendant's Exhibit QQ; the Tousley patent No. 520,973, defendant's Exhibit RR; the Bouse patent No. 644,729, defendant's Exhibit TT; Gilchrist patent No. 765,475, defendant's Exhibit WW; King patent No. 786,790, defendant's Exhibit 3A; Opsal patent No. 806,562, defendant's Exhibit 3B; Lindsay patent No. 847,955, defendant's Exhibit 3F; Hammond patent No. 876,176, defendant's Exhibit 3H; Martin patent No. 942,274, defendant's Exhibit 3K, as well as the pins and block sides introduced as defendant's Exhibits 3U, 3V and 4D. None of the claims of complainant's patent include the element of a long hub or bearing, and this element cannot be read into the claim, (see page 24 and top of page 25 of this brief), but even if considered as included, the same would have been anticipated by the prior art.

Element 1 is modified in Claim 4 by 1a, requiring the parallel sides to have annular recesses in their adjacent faces, but the limitation 1a is further limited and restricted by element 5 of the claim, which provides for "oppositely disposed bosses upon the sheave, adapted to fit closely, but anti-frictionally in the recesses." This construction is not found in any of the defendant's pulley-blocks and under the rule of law applicable to such cases, namely, that each element of the combination must be considered as material thereto and cannot thereafter be abandoned by the patentee. (See pages 28 and 29 of this brief.) The

defendant does not infringe this claim. (See Walker on Patents, 5th Ed., Sec. 349, pages 433 and 434.)

Lines 33 to 35 of the specification of patent No. 977,613 read as follows:

“Another object of the invention is to provide a pulley, the bearing pin of which is adequately protected against dirt and dust.”

Again, the last paragraph of the specification reads “the parts 21”—denominated bosses, line 13, page 2,—“of the sheave 20 fit closely in recesses 17 of the sides of the block, and the bearing pin is so housed and protected that dirt will be prevented from accumulating about the bearing of the sheave, to interfere with the rotation thereof.”

It is evident, therefore, that the complimentary elements 1a and 5 of Claim 4 were intended to constitute a dust guard. The functional language of element 5, “adapted to fit closely, but anti-frictionally,” is a limitation which confines this element strictly to a dust guard and cannot now be repudiated by the patentee. (See page 28 of this brief.)

Although defendant does not employ the elements 1a and 5 of Claim 4 and cannot, therefore, infringe, since it is well established that the omission of one element, whether essential or not, of a combination patent covered by a claim, averts any charge of infringement based on that claim. (See pages 24 to 27 of this brief.) Nevertheless, we need only to turn to the prior art to find that there is no novelty or invention in the combination embodying this element.

The Court will find that each of the elements performs no function in the Gilchrist device which it does not perform in the other devices of the prior art.

Counsel for complainant lay great stress upon the point that in the pulley-blocks just referred to the interior oil reservoir in one integral cast side is not found in one device in combination with all of the elements set forth in Claim 4; but there is no co-action between the oil reservoir and the added elements found in Claim 4 which are not found in Claim 1, so that if Claim 1 were invalid Claim 4 must likewise be invalid, as being a mere aggregation of old elements lacking patentable novelty and invention. (See pages 40 to 61 of this brief.)

The annular recesses and oppositely disposed bosses of Claim 4 either with or without the oil chamber in the side perform but one function, that of a dust guard.

The auto-lubricating side performs exactly the same function whether used with or without a dust guard. The reservoir serves only to retain the oil and the side only as a supporting means for the pulley-block. The dust guard performs no other function than that of keeping the dirt out of the bearing of the sheave. It performs this function in exactly the same way whether the pulley-block is provided with an oil reservoir or is provided with no means whatever for automatic lubrication.

The added limitations in Claim 4 which are not found in Claim 1, may be disposed of as follows:

1: Elements 1a and 5 are not found in the same

relationship in any of the defendant's devices. This defeats the contention that this claim has been infringed. The patentee has restricted the use of these elements to that of a dust guard. The oppositely disposed bosses of the sheave as used in the Mallory block do not fit closely in the annular recesses of the sides, in that the outer surface of these cylindrical bosses are approximately parallel with the bearing pin and perpendicular to the plane of the sheave, whereas the annular recesses in the sides diverge outwardly so that the recesses and the bosses in no way tend to provide a dust guard.

2: The element 3a, which requires the pin to be terminally threaded to engage the sides in the recessed portions thereof or the equivalent of this element, is implied in Claim 1 as no other means are disclosed for holding the bearing pin in place. This exact style of pin is also shown in most all of the pulley-blocks just referred to as being part of the prior art.

3: Element 6, which limits the pin to one having shoulders to engage the sides to prevent the same from binding upon the sheave, is also included by implication in Claim 1 as no other means are afforded for spacing or keeping the sides in place. This style of pin is also found in most of the pulley-blocks just referred to.

4: While Claim 1 does not specifically require the top to be removably connected with the sides, this is the only kind of a top which is shown, and the prior

art discloses that tops removably connected with the sides have been in general use for many years. Most of the pulley-blocks illustrated in defendant's catalog of 1907, defendant's Exhibit B, have removably connected tops.

The claim is a mere aggregation of old elements, all of which are found in the prior art,, both separately and in combinations, performing exactly the same functions which they are called upon to perform by this claim. No new rule of action is produced by their assemblage in one machine, and the claim must therefore be declared invalid.

Within the rule of the case of Thatcher Heating Co. v. Burtis, 121 U. S. 293, (page 93 of this brief), and numerous other cases considered at pages 77 to 81, and 92 to 103 of this brief, even if the Gilchrist pulley-block should be admitted to be a commercial success and a better pulley-block than any which preceded it, this could not elevate it to the dignity of invention.

Turning now to the analysis of Claim 5 as shown on pages 11 to 13 of this brief, it will be found that this claim reverts to the form of Claim 1, defining more closely the old construction of the Morgan patent, defendant's Exhibit 3-O, but not being so broad a claim as that of the Morgan patent, in that it is restricted or narrowed by the limitations 4, 7, 8 and 9.

It is fatal to complainant's claim of infringement of Claim 5 that said claim includes the specific limitations of elements 7 and 8. Those limitations are "projections" on the block sides and a top "having spaced

lugs between which the projections are adapted to fit." While those limitations may be wholly unnecessary, the patentee cannot repudiate them (see page 28 of this brief), and by reason thereof the defendant does not infringe. (Walker on Patents, 5th Ed., Sec. 349.)

None of the defendant's pulley-blocks has a top with spaced lugs between which the projections of the sides are adapted to fit.

Elements 1, 2, 2a, 3, 5, 5a, 5b, 5c, 6, 8 and 9 are all contained within the elements of Claim 4.

Element 3a is a limitation by words only upon the same element in Claim 4 by stating that the opening communicates with a chamber adjacent the bottom thereof. However, the communication between the axial opening of the pin and the chamber would necessarily need to be near the bottom of the chamber in either claim in order to make the chamber of any value, as otherwise the oil could not flow from the chamber into the pin.

Element numbered 4 is also included within the elements of Claim 4, although the wording is different. Claim 4 states that the bearing pin is terminally threaded to engage the sides in the recessed portions thereof so each of the sides would necessarily have a threaded opening for engagement with this pin and the language of element 4, therefore, becomes meaningless as far as distinguishing this claim from Claim 4.

Elements 7 and 8a are mere limitations upon the method of attaching the removable top, which method of attachment of the top and the providing of the

lugs discloses nothing new or novel in the construction of pulley-blocks.

The references given to show the state of the prior art as pertaining to Claim 4 are equally applicable to Claim 5.

Practically every pulley-block displayed in the Mallory catalog of 1907, being defendant's Exhibit B, describes and illustrates a pulley-block with a removably connected top connecting with the sides, which sides are provided with lateral projections at their upper ends and the top is connected to the sides of the pulley-block by means of a pin passing through a hole in a lug upon the top and through the holes in the projections upon the sides.

If there is anything in this claim concerning the lateral projections at the upper ends of the sides and the top having spaced lugs between which the projections of the sides are adapted to fit, which is not disclosed in practically all of the blocks of the prior art and all the illustrations shown in the 1907 Mallory catalog, it is that the Gilchrist claim calls for the two lugs upon the top and one lug upon each side, whereas most of the blocks of the prior art and most of the illustrations in the catalog show that there are two lateral projecting lugs at the top of each side and only one lug on the top or shackle adapted to fit between the spaced lugs upon the sides.

Removably connected and hinged tops are conclusively shown to have been old in the prior art, and I challenge counsel to find a single one of them which

does not perform all of the functions as outlined in appellant's patent.

As to the bearing pin with shoulders, oil duct and threaded ends, it was conclusively shown that this style of pin has been used generally in the construction of logging blocks since the year 1903. The same style of pin is used in defendant's Exhibits C and D, in defendant's Exhibit CC and in defendant's Exhibit 3-H. Again I challenge counsel to show a single one of these devices of the prior art in which the pin does not co-operate with the top to hold the cheeks in alignment, co-operate with the sheave to provide long bearing surface for the long hub of the sheave, co-operate by its shoulders to prevent ends of sheave hub from coming into frictional contact with sides of blocks, co-operate with the side in which it is terminally mounted to hold sheave in operative position. As to Exhibits C, D, and all of the other devices of the prior art embodying an oil chamber, the pin also co-operates with the oil chamber by oil duct to feed oil to the bearing surface of the pin and sheave.

It has also been conclusively shown that sheaves with oppositely disposed bosses are old in the prior art. They are shown in the Labadie patent No. 513,067, defendant's Exhibits QQ and CC, defendant's Exhibits GG, I, L and M, by the block side, defendant's Exhibit 3-R, by the pin, defendant's Exhibit 3-V, by the pulley-blocks illustrated in Mallory's 1907 catalog, defendant's Exhibit B, on pages 5, 6, 8 and 10.

By turning to the record of the Taylor testimony, it will be found that as far back as 1907 Mr. Taylor

manufactured the pulley - block illustrated by Figs. 85 on page 6 of the 1907 Mallory catalog, defendant's Exhibit B, and that the block side 3-R just referred to is one of the old block sides of this very pulley - block. The testimony of Mr. Taylor with reference to this pulley - block shows that the pins were terminally mounted or screwed into the sides of the block, that the sides had annular recesses, that the sheave had oppositely disposed bosses adapted to fit in the recesses, that the pin had an axial hole communicating with the bearing surface by a radial hole, that it was provided with a removably connected top which could be readily opened for the introduction or removal of the cable. Mr. Taylor also testifies to the making of the shackle or top, defendant's Exhibit 3-T, as far back as 1907. While this style of top is not used by defendant, it serves to show that there was nothing novel in the Gilchrist claim concerning a top with spaced lugs.

Pages 8, 9 and 10 of defendant's Exhibit B illustrate pulley-blocks which have the combination of oil reservoirs, cups or elbows, sides provided with annular recesses, and sheaves with oppositely disposed bosses, and by turning to the testimony of Mr. Mallory (R. 56 to 64) it is found that these pulley-blocks having oil reservoir elbows, sides with annular recesses, shoulder pins screwing into the sides, the pins being provided with an axial and radial hole by which there was a communication between the oil chamber and the bearing surface of the pin, were made as far back as 1902.

The oppositely disposed bosses fit no more closely

in the annular recesses of the sides in the pulley-blocks made by defendant, which complainant now contends infringe his patent, than did the bosses of the sheaves in the blocks which have just been considered. Complainant must, therefore, be bound by the rule of law laid down in the case of *Knapp v. Morss*, 150 U. S. 288, namely: "That which infringes if later would anticipate if earlier."

It should be noted that there is nothing in the language of the claims which in any way describes a long hub. A hub might be either long or short and still have oppositely disposed bosses adapted to fit in annular recesses of the sides. There is nothing in the language of the claims which confines the bosses of the sheave to what might be termed "knob bosses." The bosses might be constructed similar to those illustrated in defendant's Exhibit I and on pages 5 and 6 of defendant's Exhibition B, by having an annular recess in the side alone or in both the sheave and the side. In these particular illustrations, the bosses do extend out beyond the plane of the outer surface of the sheave, but they would still have remained bosses had they been shortened so as to be in line with the plane of the outer surface of the sheave periphery.

Again, I challenge counsel to find a single element or the function of a single element which was not old in the prior art.

We next come to the subdivision pertaining to the parallel sides, one of which is provided with an interior oil chamber. Counsel are very careful to consider the side and the oil chamber as one element.

But I challenge counsel to show wherein the interior oil chamber co-operates with any element to hold the sheave in operative position; or with the top to support the pulley; or with the removably hinged top to make it easier to place or remove the cable; or with the pin and removably connected top jointly to hold the sides parallel; or with the annular recesses of the sides to keep out the dirt from the pin. The only element with which the oil chamber co-operates is the oil duct by which the oil is fed from the reservoir to the pin, and the oil chamber performs exactly this same function whether in the side or without the side. It is clear that the question of supporting the pulley-block or the strengthening of it was not the task which the patentee sought to solve, as he provided but one side of his pulley-block with an interior oil chamber. To contend that the task which complainant sought to solve was that of making a stronger pulley-block would be as absurd as to say that a man might place one large link in a small chain and obtain a patent upon it for having strengthened the chain. The chain would be no stronger than its weakest link, and the pulley-block would be no stronger than its weakest side.

However, if counsel for appellant insist that there is merit in the contention that the oil reservoir within the side adds strength to the side, and that it should be considered in that connection, we have but to refer them to the Butters pulley-block, defendant's Exhibit 4C, the Labadie pulley-block, defendant's Exhibit CC, and to the Ludford pulley-block, defendant's Exhibit EE; but as has been heretofore indicated, the complain-

ant ascribed to the oil chamber a particular function, namely: "To provide a pulley which will contain a considerable quantity of lubricant and feed the same, automatically and slowly, upon the bearing pin of the pulley." As shown on page 28 of this brief by the case of *Masseth v. Larkin*, 111 Fed. 409, this ascription is a limitation of that claim and the patentee cannot now claim that this element is an improvement in any other respect.

Counsel for appellant seem to advance the theory that before the patent can be defeated it will be necessary to show all of the elements of the claim in a single device of the prior art. If appellant's theory in this respect were true, there would be no limit to the patents which could be issued to those who have contributed nothing new and useful to the art, and there would be no limit to the unjust monopolies which could thereby be obtained. All that would be necessary in order to obtain a patent would be to select and combine in one article well known elements of other articles of the prior art and with no change of function as a result of the combination obtain a patent thereon, which would thereafter prevent the use of these elements in any future combination, and thus result in depriving real inventors from the just fruits of their inventions.

By way of illustration—although pneumatic tires had long been used on bicycles and other vehicles, by the application of the theory advanced by complainant's counsel, the law would permit the maker of the first automobile to obtain a patent upon an automobile provided with pneumatic tires. There would need to be

nothing novel in the construction of the automobile, and the automobile might have no commercial value, but those who had thereafter perfected the automobile would thereby be subjected to heavy royalties for the use of pneumatic tires upon their automobiles. The public would thereby be unjustly taxed for the benefit of one who had contributed nothing new or useful to the art.

There is not a single element in any of the claims of patent No. 977,613 which cannot be found in the prior art performing exactly the same function. By again turning to the analysis of Claim 1 (page 8 of this brief) and examining each of the elements, it will be found that element 1 covers the sides of the pulley-block. It is plain that the sides in all pulley-blocks perform the same function, namely: that of supporting the sheave and affording means by connection with a top or shackle by which the block itself may be supported. This is the same function which sides of pulley-blocks have always performed.

The next element is that of an interior oil chamber in one of the sides, qualified by having an inlet adjacent the top of the block. As heretofore stated, the only function which this element performs is that of holding a supply of oil for lubricating the block. It in no way affects or changes the mode of operation, strength or efficiency of any of the other parts. All of the other elements are attached in a like manner and perform their functions in the same manner that they would perform them if this oil reservoir were lacking. There is nothing added to the functioning of the pulley-block, save and excepting that it provides a means for holding a

quantity of oil which may feed to the bearing of the sheave by gravity and the draw on the oil by the rotation of the sheave, in exactly the same way as in the Morgan block and as in defendant's Exhibits C and D.

Element 3, the bearing pin, is found in a greater portion of the blocks of the prior art in exactly the same formation and functioning exactly the same. The pin has no more than three functions in the Gilchrist blocks, and these three functions are found in defendant's Exhibits C and D and in other pulley-blocks of the prior art. These functions are, first, to provide a bearing surface upon which the sheave may rotate; second, to hold the sides of the pulley-block in their proper positions; and, third, to provide a means through which the oil for lubrication may be passed to the bearing surface. All three of these functions are found in the Morgan block and in defendant's Exhibits GG, CC, F, G, H, J, K, I, L, M, N, O, P, Q, R, TT, HH, 3-A, 3-B, 3-F, 3-K and 3-H.

The pins of all of these blocks are terminally mounted in the sides and the axial opening in each of the pins extends through the side wall of the pin so that the functioning of all of the parts pertaining to the lubrication of the pulley-block is substantially the same. Many of them, such as those used in connection with defendant's Exhibits C and D also communicate with the oil chamber or reservoir. A sheave journaled for rotation upon the pin between the sides is as old as the simple machine known as the pulley-block.

A like examination of each of the elements in the other claims makes it clear that there is nothing in any

of these claims resulting from the combination of elements which brings about any coaction or coordination between the elements which is not shown by the prior art. Nor is there any new result produced, for, as heretofore set forth, there is but one result which can be credited to any pulley-block, namely: that of supporting, guiding or directing a rope or line. A pulley-block consisting merely of sides, attached together either with or without a top, and having a sheave held in place by a bolt passing through the sides, will produce the same result. Any difference between this simplest of pulley-blocks and the most highly improved of pulley-blocks is not a difference of function, but rather a difference in durability or excellence of the article itself. When this excellence, durability or superiority of the article is brought about by combining elements which coordinate and coact differently from what may be found in the prior art, it may be the subject of an invention for an improvement; but the mere bringing together of old elements into one combination wherein there is no change in the functioning of the elements, and wherein there is no new result by reason of the coaction of the elements thus brought together, by which the result is no more than the mere sum of the separate functions, is but a mere aggregation and does not constitute invention.

The evidence discloses that all of the cast side pulley-blocks have been a commercial success, by reason of the fact that attractive designs could readily be made by using cast sides. Cast sides were in general use long before Gilchrist applied for his patent, and the

evidence shows that the defendant, who is the biggest dealer in logging blocks in the Pacific Northwest, carries 115 designs of pulley-blocks embodying an interior oil reservoir in the pin, or straight or elbow oil cups, whereas there are only 32 designs of pulley-blocks which have an oil reservoir in the side. (See R. 518 and 519 of the testimony.) The testimony further shows that the defendant has confined his oil reservoir side to the high lead and skyline blocks and still retains the oil elbow and oil cup for his smaller designs of pulley-blocks. There was no real demand for a pulley-block with an oil reservoir in the side until the skyline system of logging was adopted. It was the defendant who pioneered this system of logging in the Pacific Northwest. It was the defendant who first made large pulley-blocks for this purpose. The large, powerful donkey engine, the improved systems of logging, and the various other devices which have been taken up in the last few years have all entered into the question of making a commercial success of the oil reservoir pulley-block.

It is the attractiveness of these blocks, by reason of the artistic designs which have been worked out in the castings, together with their general utility, which has made the pulley-blocks with the auto-lubricating sides a commercial success. Defendant and some of the other manufacturers have apparently produced more attractive pulley-blocks than the complainant, by which reason they have created a greater demand for their own pulley-blocks than complainant has created for his. The complainant apparently makes all of his pulley-blocks

with the auto-lubricating side, whereas the defendant makes all of his smaller pulley-blocks with oil cups. Defendant testified that he keeps in touch with the demands of the logger and that he carries a well-balanced stock of the designs illustrated in his catalog, and as has heretofore been indicated, the greater percentage of defendant's pulley-blocks are still made without lubricating sides. This certainly does not indicate that the auto-lubricating side has driven the other pulley-blocks from the market, but it does indicate that it is something more than the mere auto-lubricating side which has made a commercial success of all of these pulley-blocks.

The finding of lack of novelty or invention, or want of infringement on the part of the defendant, would make it unnecessary for the Court to consider the question of estoppel.

However, the testimony shows that complainant was well aware of the fact that the defendant was going to considerable expense and was building up a trade for a skyline system of logging, in connection with which he had designed a large auto-lubricating block in which the oil reservoir was located in the side. The complainant made no complaint to the defendant with reference to this matter, but word came to the defendant indirectly that the complainant had stated that he considered defendant's blocks as an infringement of his patent, and that he intended to allow the defendant to continue the manufacture and sale of the same until such time as it would be worth while for the complain-

ant to bring an infringement suit against the defendant. (R. 54 and 65 to 70).

When this information reached the defendant, he immediately caused a search to be made in the patent office and obtained the legal opinions of attorneys in both Washington, D. C., and in Portland, Oregon, upon the question as to whether or not his line of blocks was infringing upon any patents, and especially upon any patents issued to the appellant herein. Upon receiving these opinions, he immediately communicated with the complainant, advising him of what he had heard, of the result of the search, and of the opinions which had been given to him by his attorneys, stating that he did not wish to infringe upon any one's rights and that he did not believe he was so infringing. Complainant was invited to take the matter up with defendant, and to examine the prior patents and the opinions of his attorneys. The complainant did not then state positively to the defendant that the defendant was infringing upon his line of blocks, but merely wrote to him that he had considered that the defendant's blocks were infringing upon his patents, that he would be pleased to examine the opinions and patents referred to; and the matter was finally left to rest until such time as the complainant could be in Portland to take the matter up with the defendant.

A little later on, a list of the prior patents was furnished to the complainant, which it was felt were complete anticipation of the Gilchrist patents. (R 54 and 65 to 70).

Shortly after this, complainant placed upon the open market pulley-blocks embodying all of the elements of the claims of patent No. 977,613, without marking thereon the patent date, in absolute disregard of the provisions of Sec. 4900, U. S. Revised Statutes. (R. 95 to 98).

Nothing further was heard from the complainant until just a short time prior to the commencement of this suit.

Certainly these facts were sufficient to justify the defendant in believing that if the complainant had ever thought his patent was valid he had come to the conclusion that the same was not valid and had made up his mind to abandon the same.

In view of the complainants actions in this respect, the general statements concerning his patents which were carried in advertisements published in "The Timberman" must be considered as mere "dealer's talk" for advertising purposes only, and cannot be considered as information directed to the defendant to charge him with knowledge that the complainant intended to hold the defendant as an infringer.

Estoppel by laches has been as fully established in this case as in the case of Vacuum Cleaner Co. v. Innovation Electric Co., considered beginning at page 116 of this brief.

By way of a summary of some of the points raised it may be stated:

1. It is contended that if the claims of the patent

constitute a mere aggregation of old elements, the claims are invalid for want of invention.

2. It is contended that where all of the elements of a combination claim are old, there must be some coaction of elements to save the claim from the charge of aggregation.

Counsel for appellant contend that coaction of elements is shown by showing that each element performs a useful purpose in the combination and by showing that a better article is produced which has become a commercial success; but it is the contention of appellee that the commercial success of an article alone can never elevate an operative device to the dignity of an invention. There must be some new coaction of elements, or some new mode of operation, by which a new and useful result or a new and distinctive machine is created, and even then there must be disclosed more than mere mechanical skill by one skilled in that particular art.

3. Appellee contends that coaction or "joint and co-operating action of old elements" to constitute a true combination within the meaning of the patent law requires more than the mere assembling in an operative device of elements selected from other devices. To be patentable there must be a new mode of operation, or a new effect of one or more elements upon one or more other elements of the combination. For example, a machine might be made up of nine elements no seven of which could be found in the same combination in any other device. The machine might be the best machine ever produced, yet if none

of the elements so combined could be found having some new operative effect upon some other element or elements different from what it could be found doing in some other device of the prior art, the machine would be the result of a mere aggregation of old elements and could not be the subject of an invention. No presumption of invention from the issuance of a patent nor from the commercial success of such a machine can ever raise such a device to the dignity of an invention. When the skilled mechanic looks at a machine and knows its law or mode of operation it does not require the exercise of the inventive faculty to replace poor parts with good parts, when he has on hand such good parts which have performed like functions in other machines. Neither does it involve the exercise of the inventive faculty to assemble a new machine by putting together the parts of other machines so that each of the parts performs its old function. (See Topical Index).

Counsel for appellant have cited a number of cases in their brief, but not one of these cases discloses the situation of a patent for a machine or operative device being held valid without the disclosure of a new mode of operation or the inclusion of an element or elements which cannot be found in the prior art. (See analysis of appellant's cases).

4. A new result within the meaning of the patent law calls for something more than a better machine. (See Topical Index).

5. Combined results are not patentable. (See Topical Index).

6. Introduction of one new element does not prove invention. (See Topical Index).

7. Casting side and oil chamber in one piece is, not invention. (See Topical Index). Counsel for appellant cite the case of *Krementz v. Cottle* to sustain their theory on this question, but the Court had under consideration in that case a collar button, an article of manufacture, not a machine. This case has been considered and distinguished in the case of *Computing Scale Co. of America v. Automatic Scale Co.*, 204 U. S. 609, 51 Law Ed. 650. See consideration of this very subject as to a one piece collar button in the later case of *Herzog v. Keller Co.*, 234 Fed. 86, pages 62 and 70 of this brief.

8. Selecting elements from other devices is not invention. (See Topical Index).

9. Patentee has not claimed a one piece cast side and cannot now claim that feature as an element of his invention as the claim measures the invention and cannot be enlarged by the specifications and all which has not been claimed has been dedicated to the public. (See Topical Index).

10. The patentee has, by his specifications, ascribed to his interior oil chamber the single function of containing a considerable quantity of lubricant and feeding the same automatically and slowly upon the bearing pin of the pulley. Neither the claims nor the specification state that the side and reservoir shall be in one piece nor that the same shall be a cast side and the claims cannot be reconstructed or broadened so as to cover a side and oil chamber cast in one integral

piece. (See *Masseth v. Larkin*, 111 Fed. 409, pages 23, 24, 27, 28, 108, 113, 114 and 115 of this brief).

11. The patents solve no problem and do not involve invention. (See Topical Index).

12. The scope of the inventions claimed cannot be broad enough to include defendants devices without reading upon devices of the prior art and defeating the claims under the rule, "that which would infringe if later, anticipates if earlier." (See Topical Index).

13. While the issuance of a patent and the commercial success of an article may sometimes be said to create "a prima facie presumption of invention and novelty," such a presumption is but "a mere rule of evidence," which "cannot be used to resolve the doubt as well as to create it"; "cannot usurp the province of the Court to declare what constitutes novelty" and has never been indulged in to give validity to a combination claim, having no new mode of operation, where all of its elements may be found either in combinations or separately in devices of the prior art performing the same function.

14. The file wrappers and contents, in view of the prior state of the art, destroy all presumptions of validity. (See Topical Index).

In one sense of the word there is a new result whenever there is a new assemblage of elements, but as disclosed by the authorities in this brief, this is not the new result which is required under the patent law to establish invention.

Having been taught the art of paraphrasing from complainant's brief in the trial court. I will now turn to the quotation from the case of *Thatcher Heating Co. v. Burtis*, 121 U. S. 293, and found on page 93 of this brief, and use that as my text:

"The new and improved result in the utility of a pulley-block cannot be said to be due to anything in the combination of elements which compose it, in any other sense than that it arises from bringing together old and well-known separate elements, which, when thus brought together, operate separately, each in its own old way.

"There is no specific quality of the result which cannot be definitely assigned to the independent action of a single element. There is therefore no patentable novelty in the aggregation of the several elements, considered in itself."

"The late Circuit Judge William K. Townsend, a most profound patent law jurist, has well stated at page 396 of *'Two Centuries Growth of American Law,'* that accordingly, 'it is now settled that the production of improvements reasonably certain to have been adopted in the development of a new branch of industry opened up by invention does not entitle the producer to a monopoly. The patent office, however, has generally issued a patent to any one who produced a device not before known, unless it was considered reasonably clear that such device did not involve invention. Therefore, in finding a remedy to the evils above stated, the courts have held invalid a large percentage of litigated patents. This doctrine of the

necessity of patentable invention as well as novelty has changed the whole phase of patent litigation. The question is no longer "is it new?" alone; but, "is it such as would have occurred to a skilled mechanic without the exercise of inventive genius?" The changes in the law on this subject make the history of patent law in the United States.' "

Boss Mfg. Co. v. Thomas, 182 Fed. 811-816.

The Gilchrist pulley-block may be a better pulley-block than the old pulley-block without an oil chamber, but defendant's auto-lubricating pulley-blocks and the auto-lubricating pulley-blocks made by various other manufacturers are also better than the old pulley-blocks without an oil chamber.

It would be unfair to the appellee, to other manufacturers and to the public to grant to appellant a monopoly in the manufacture of such a pulley-block.

In conclusion, I will take as my text for paraphrasing the language of the eminent patent jurist, Justice Bradley, as found in the case of *Atlantic Works v. Brady*, 107 U. S. 192:

"The process of development in pulley-blocks creates a constant demand for new appliances, which the skill of ordinary head workmen and engineers is generally adequate to devise, and which, indeed, are the natural and proper outgrowth of such development. Each step forward prepares the way for the next, and each is usually taken by spontaneous trials and attempts in a hundred different places. To grant to a single party a monopoly of every slight advance made, except where

the exercise of invention somewhat above ordinary mechanical or engineering skill is distinctly shown, is unjust in its principle and injurious in its consequences. The design of the patent laws is to reward those who make some substantial discovery or invention which adds to our knowledge and makes a step in advance in the useful arts. Such inventors are worthy of all favor. It is never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufacture. Such an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention. It creates a class of speculative schemers who make it their business to watch the advancing wave of improvement, and gather its foam in the form of patented monopolies, which enable them to lay a heavy tax upon the industry of the country without contributing anything to the real advancement of the arts. It embarrasses the honest pursuit of business with fears and apprehensions of concealed liens and unknown liabilities to lawsuits and vexatious accountings for profits made in good faith."

Respectfully submitted,

LOYAL H. McCARTHY,

Attorney for Appellee.

United States
3
Circuit Court of Appeals
For the Ninth Circuit.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,
vs.

KING COUNTY, WASHINGTON, a Municipal
Corporation, CLAUDE C. RAMSEY, LOU
C. SMITH and THOMAS DOBSON, In-
dividually and as County Commissioners for
King County, Washington,
Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of
the Western District of Washington, Northern Division.

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Circuit Court of Appeals
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THE UNITED STATES OF AMERICA,
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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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431 County-City Building, Seattle, Washington.

HOWARD A. HANSON, Esq., Deputy Prosecuting Attorney for King County, Washington, Attorney for Defendants in Error,
431 County-City Building, Seattle, Washington.

Hon. L. L. THOMPSON, Attorney General, State of Washington, Attorney for Defendants in Error,
Olympia, Washington. [1*]

*Page-number appearing at foot of page of original certified Transcript of Record.

United States District Court, Western District of
Washington, Northern Division.

No. 5926.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KING COUNTY, WASHINGTON, a Municipal
Corporation, CLAUDE C. RAMSEY, LOU
C. SMITH, and THOMAS DOBSON, Indi-
vidually and as County Commissioners for
King County, Washington,

Defendants.

Complaint.

The United States of America, by its attorneys, Robert C. Saunders, United States Attorney for the Western District of Washington, and F. C. Reagan, Assistant United States Attorney for the Western District of Washington, brings this its complaint against King County, Washington, a municipal corporation, and Claude C. Ramsey, Lou C. Smith and Thomas Dobson, individually and as County Commissioners for King County, Washington (hereinafter called the defendants), and for its cause of action herein alleges as follows, to wit:

I.

That the above-named defendant, King County, Washington, is a municipal corporation organized and existing under the laws of the State of Washington, and was such corporation from November

1, 1917, up to January 1, 1921, and that the principal office of said corporation where its books of accounts and other data from which its return to the Clerk of Internal Revenue can be prepared, is and at all times herein mentioned has been located in the city of Seattle, State of Washington. [2]

II.

That the defendants, Claude C. Ramsey, Lou C. Smith and Thomas Dobson, are the duly elected, qualified and acting County Commissioners of King County, Washington, a municipal corporation.

III.

That the defendants, and each of them, from the first day of November, 1917, to the first day of January, 1921, maintained and operated lines of ferry-boats for the transportation of freight and passengers on various routes between the city of Seattle and different points within and without the county of King, Washington.

IV.

That the Act of Congress of October 3, 1917, and the Act of Congress of February 4, 1919, provides that a tax shall be levied, assessed, collected, and paid, said tax to be based upon the amount paid for transportation, by the persons paying for the services or facilities rendered, and that the persons receiving such payments should collect the tax and make monthly returns, and pay over the tax so collected to the Collector of Internal Revenue for the district in which said services were rendered.

V.

That the said defendants, and each of them wil-

fully failed, refused and neglected to make such collections and make said returns from November 1, 1917, to January 1, 1921, as required by law, to the Collector of Internal Revenue of the District of Washington, monthly, or at any other time.

VI.

That by reason of the wilful failure, neglect and refusal of the said defendants, and each of them, to collect said tax and make [3] the returns provided by law, the plaintiff has been deprived of the sum of \$5,719.04, and by reason of said failure, neglect and refusal of said defendants, they and each of them became, and are, liable to the penalty prescribed by said acts of Congress in the sum of \$5,719.04.

WHEREFORE, plaintiff prays that it do have and recover of and from said defendants, and each of them, the sum of \$5,719.04, together with its costs and disbursements herein.

ROBERT C. SAUNDERS,

United States Attorney.

F. C. REAGAN,

Assistant United States Attorney.

United States of America,
Western District of Washington,
Northern Division,—ss.

F. C. Reagan, being first duly sworn, on his oath deposes and says: That he is Assistant United States Attorney for the Western District of Washington; that he has read the foregoing complaint,

knows the contents thereof; that the same is true as he verily believes.

F. C. REAGAN,

Subscribed and sworn to before me this 17th day of March, 1921.

[Seal U. S. District Court.]

FRANK L. CROSBY, Jr.,

Deputy Clerk, U. S. District Court, Western District of Washington.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 17, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [4]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 5926.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KING COUNTY, WASHINGTON, a Municipal Corporation, CLAUDE C. RAMSAY, LOU C. SMITH, and THOMAS DOBSON, Individually and as County Commissioners for King County, Washington,

Defendants.

Demurrer.

Come now King County and Claude C. Ramsay, Lou C. Smith and Thomas Dobson, individually and as County Commissioners for King County, Washington, defendants above named, and demur to the complaint in the above-entitled action upon the following grounds:

I.

That it appears from the facts of said bill of complaint that the Court has no jurisdiction of the subject matter of said action.

II.

That the said bill of complaint does not state facts sufficient to constitute a cause of action.

III.

That there is a misjoinder of parties defendant in the above-entitled action in that the defendants Claude C. Ramsay, Lou C. Smith and Thomas Dobson are each impleaded individually. [5]

IV.

That there is a misjoinder of parties defendant in the above-entitled action in that the defendants Claude C. Ramsay, Lou C. Smith and Thomas Dobson are each impleaded as County Commissioners for King County, Washington.

MALCOLM DOUGLAS,

Prosecuting Attorney,

HOWARD A. HANSON,

Deputy Prosecuting Attorney,

L. L. THOMPSON,

Attorney General of Washington,

Attorneys for Defendants.

Due service of the within demurrer acknowledged and receipt of copy thereof admitted this 28th day of May, 1921.

ROBT. C. SAUNDERS,
Attorney for Plaintiff.
By E. D. DUTTON.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 28, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [6]

In the District Court of the United States, Western District of Washington, Northern Division.

No. 5926.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

KING COUNTY, WASHINGTON, a Municipal Corporation, CLAUDE C. RAMSAY, LOU C. SMITH, and THOMAS DOBSON, Individually and as County Commissioners for King County, Washington,
Defendants.

Memorandum Decision on Demurrer.

Filed June 25, 1921.

Hon. ROBT. C. SAUNDERS, U. S. Attorney, Hon.
F. C. REAGAN, Ass't U. S. Attorney, for
Plaintiff.

Hon. MALCOLM DOUGLAS, Prosecuting Attor-
ney, HOWARD A. HANSON, Deputy Pros-
ecuting Attorney, Hon. L. L. THOMPSON,
Attorney General, for Defendants.

CUSHMAN, D. J.

The United States sues to recover from King County and the County Commissioners, a transportation tax, of which it alleges it has been deprived, and which accrued on account of amounts paid for the transportation of freight and passengers on certain ferry-boats maintained and operated by the County.

In the maintenance and operation of ferries, the county and its officers are not engaged in a private business, but, on the contrary, are acting in a state and county governmental capacity and for the benefit of the public.

Slaughter-House Cases, 16 Wall. (83 U. S.)
36 at 88;

East Hartford vs. Hartford Bridge Co., 10
How. (51 U. S.) 511. [7]

Therefore, So. Carolina vs. U. S. (199 U. S. 437)
is not in point.

The rule is well recognized that the Government
will not tax the State on account of its governmen-

tal acts and agencies in the discharge of its duty to the public.

- U. S. v. B. & O. R. R. Co. 17 Wall. 322;
- Collector v. Day, 78 U. S. (11 Wall.) 113;
- Mercantile Bank v. N. Y., 121 U. S. 138;
- Van Brocklin v. Tennessee, 117 U. S. 151;
- Georgia v. Atkins, 1 Abbott, 22;
- Pollock v. Farmers L. & T. Co., 157 U. S. 429;
- Evans v. Gore, 253 U. S. 245;
- Dobbins v. Commissioners of Erie, 16 Peters, 435.

Before any statute will be held to have contemplated, or undertaken to authorize the collection by the Federal government of a tax from the county—a governmental subdivision of the State—on account of its action in discharging its duty to the public, in a matter resting within its governmental authority to such an extent as does the maintenance and operation of a ferry, such intent would have to be clearly and explicitly expressed in the statute, which is not true in the present case.

Having reached this conclusion, it is unnecessary to determine whether the Government has, or has not such an authority.

The demurrer will be sustained.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 25, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [8]

United States District Court, Western District of
Washington, Northern Division.

No. 5926.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KING COUNTY, WASHINGTON, a Municipal
Corporation, CLAUDE C. RAMSAY, LOU
C. SMITH, and THOMAS DOBSON, Indi-
vidually and as County Commissioners for
King County, Washington,

Defendants.

Stipulation Re Amendment of Complaint.

IT IS HEREBY STIPULATED AND AGREED
by and between the parties hereto, by their re-
spective counsel, that the complaint herein may be
amended by interlineation, by inserting in para-
graph V thereof the word "wilfully" before the
word "failed," at the beginning of the second line
thereof, and by inserting in paragraph VI of said
complaint the word "wilful" before the word "fail-
ure" in the first line thereof.

IT IS FURTHER STIPULATED AND
AGREED between the parties hereto, by their re-
spective counsel, that the demurrer of defendants
shall be deemed to apply to the complaint as so
amended, and the decision and judgment of the
Court upon such demurrer shall so apply.

Dated at Seattle, Washington, this 28th day of July, 1921.

ROBT. C. SAUNDERS,
United States Attorney,
F. C. REAGAN,

Assistant United States Attorney,
Attorneys for Plaintiff.

MALCOLM DOUGLAS,
HOWARD A. HANSON,
Attorneys for Defendants. [9]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 29, 1921. F. M. Harshberger, Clerk.
[10]

United States District Court, Western District of
Washington, Northern Division.

No. 5926.

UNITED STATES OF AMERICA,
Plaintiff,
vs.

KING COUNTY, WASHINGTON, a Municipal
Corporation, CLAUDE C. RAMSAY, LOU
C. SMITH, and THOMAS DOBSON, Indi-
vidually and as County Commissioners for
King County, Washington,
Defendants.

Order Allowing Amended Complaint and Demurrer.

THIS MATTER coming on duly and regularly to be heard upon the stipulation of the parties hereto for the amendment of the complaint herein by interlineation in paragraphs V and VI of said complaint, and providing in such stipulation that the demurrer of the defendants to the complaint shall apply to the amended complaint, now, therefore,—

IT IS HEREBY ORDERED that the complaint herein be amended by interlineation as in such stipulation provided, and the clerk of the above-entitled court is hereby directed to interline the original complaint on file in his office in accordance with said stipulation; and

IT IS FURTHER ORDERED that the demurrer of the defendants to said complaint shall apply with like force and effect to the complaint as amended, and any judgment upon said demurrer shall apply with like force and effect to the complaint as amended and the demurrer thereto.

Done in open court this 28th day of July, 1921.

EDWARD E. CUSHMAN,
Judge.

O. K. as to form.

HOWARD A. HANSON,
O. K.—F. C. REAGAN,
Asst. U. S. Atty.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern

Division. Jul. 29, 1921. F. M. Harshberger, Clerk.
[11]

United States District Court, Western District of
Washington, Northern Division.

No. 5926.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KING COUNTY, WASHINGTON, a Municipal
Corporation, CLAUDE C. RAMSAY, LOU
C. SMITH, and THOMAS DOBSON, Indi-
vidually and as County Commissioners for
King County, Washington,

Defendants.

**Order Sustaining Demurrer and Judgment of Dis-
missal.**

THIS MATTER coming on duly and regularly
to be heard before the above-entitled court on the
20th day of June, 1921, upon the demurrer of de-
fendants to the bill of complaint herein, the parties
hereto being represented in court by their respec-
tive attorneys of record, the demurrer having been
argued to the Court and the matter having been
submitted to the Court upon briefs of respective
counsel, the Court having taken said matter under
advisement and being fully advised in the prem-
ises, and having filed herein its memorandum opin-
ion sustaining said demurrer, and the parties hereto
have stipulated for the amendment of the com-

plaint by interlineation and that the demurrer of defendants to the complaint shall apply with like force and effect to the amended complaint, the Court having by order entered herein allowed such amendment in accordance with such stipulation, and having considered the complaint as amended and the demurrer thereto, and being fully advised in the premises; now, therefore,

IT IS HEREBY ORDERED that said demurrer to the original complaint be, and the same is hereby, sustained; and

IT IS HEREBY FURTHER ORDERED that said demurrer to the [12] original complaint as amended be, and the same is hereby, sustained.

Plaintiff having in open court refused to plead further and elected to stand upon its complaint herein,—

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the above-entitled action be, and it is hereby, dismissed.

To all of which plaintiff excepts, and its exception is hereby allowed.

Done in open court this 28th day of July, 1921.

EDWARD E. CUSHMAN,

Judge.

O. K. as to form.

F. C. REAGAN,

Asst. U. S. Atty.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 29, 1921. F. M. Harshberger, Clerk.

United States District Court, Western District of
Washington, Northern Division.

No. 5926.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KING COUNTY, WASHINGTON, a Municipal
Corporation, CLAUDE C. RAMSAY, LOU
C. SMITH, and THOMAS DOBSON, Indi-
vidually and as County Commissioners for
King County, Washington,

Defendants.

Petition for Writ of Error.

Comes now the United States of America, plain-
tiff in the above-entitled cause, and feeling ag-
grieved by the final judgment herein entered on
the 29th day of July, 1921, petitions this Court for
an order allowing it to prosecute a writ of error
to the United States Circuit Court of Appeals for
the Ninth Circuit, and according to the laws of the
United States in that behalf made and provided,
there to correct certain errors committed to the
prejudice of the said plaintiff, which more in detail
appear from the assignment of errors filed with
this petition, and prays that a writ of error issue
out of said Court of Appeals for the correction of
the error so complained of, and that the transcript
of the record and proceedings and papers in this

cause, duly authenticated, may be sent to said Court of Appeals.

ROBT. C. SAUNDERS,
United States Attorney,
F. C. REAGAN,
Assistant United States Attorney,
Attorneys for Plaintiff.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 6, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [14]

United States District Court, Western District of
Washington, Northern Division.

No. 5926.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

KING COUNTY, WASHINGTON, a Municipal
Corporation, CLAUDE C. RAMSAY, LOU
C. SMITH, and THOMAS DOBSON, Indi-
vidually and as County Commissioners for
King County, Washington,

Defendants.

Assignment of Errors.

Comes now the plaintiff, United States of
America, by and through Robert C. Saunders,
United States District Attorney, and F. C. Reagan,

Assistant United States District Attorney, and files the following assignment of errors upon which it will rely upon its appeal from the judgment made by this Honorable Court on the 29th day of July, 1921, in the above-entitled cause:

I.

That the United States District Court for the Western District of Washington, Northern Division, erred in sustaining the demurrer of the defendants to the complaint of the plaintiff herein.

II.

That said District Court erred in dismissing said action.

ROBT. C. SAUNDERS,

United States Attorney,

F. C. REAGAN,

Assistant United States Attorney,

Attorneys for Plaintiff.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 6, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [15]

United States District Court, Western District of
Washington, Northern Division.

No. 5926.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KING COUNTY, WASHINGTON, a Municipal
Corporation, CLAUDE C. RAMSAY, LOU
C. SMITH, and THOMAS DOBSON, Indi-
vidually and as County Commissioners for
King County, Washington,

Defendants.

Order Allowing Writ of Error.

Comes the plaintiff, United States of America, by its attorneys, and files herein and presents to the Court its petition praying for the allowance of a writ of error on assignment of errors intended to be urged, and praying also that a transcript of record and proceedings, upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings be had as may be proper in the premises.

Now, on consideration thereof, the Court does hereby allow the writ of error prayed for.

Dated this 5th day of October, 1921.

EDWARD E. CUSHMAN,
United States District Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 6, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [16]

United States District Court, Western District of
Washington, Northern Division.

No. 5926.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KING COUNTY, WASHINGTON, a Municipal
Corporation, CLAUDE C. RAMSAY, LOU
C. SMITH, and THOMAS DOBSON, Indi-
vidually and as County Commissioners for
King County, Washington,

Defendants.

**Admission of Service of Petition for Writ of Error,
etc.**

Due, timely and regular service, together with the receipt of copies thereof, of the plaintiff's petition for writ of error, assignment of errors, of order allowing writ of error, and praecipe for tran-

script of record, is hereby admitted this 5th day of October, 1921.

MALCOLM DOUGLAS,
Pros. Atty.,
HOWARD A. HANSON,
Dep. Pros. Atty.,
L. L. THOMPSON,
Atty. Gen'l of Washington,
Attorneys for Defendants.

Received a copy of the within this 5 day of October, 1921.

MALCOLM DOUGLAS,
Pros. Atty.,
HOWARD A. HANSON,
Dep. Pros. Atty.,
L. L. THOMPSON,
Atty. Gen'l of Washington,
Attorneys for Defendants.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 6, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [17]

United States District Court, Western District of
Washington, Northern Division.

No. 5926.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KING COUNTY, WASHINGTON, a Municipal
Corporation, CLAUDE C. RAMSAY, LOU
C. SMITH, and THOMAS DOBSON, Indi-
vidually and as County Commissioners for
King County, Washington,

Defendants.

Praeipie for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please prepare a typewritten transcript of record in the above-entitled cause on writ of error, and file the same in the United States Circuit Court of Appeals for the Ninth Circuit, said record to comprise the folowing papers:

1. Complaint.
2. Demurrer.
3. Memorandum decision.
4. Stipulation.
5. Order allowing amended complaint and demurrer,
6. Order sustaining demurrer, and judgment.
7. Petition for writ of error.
8. Assignment of errors.
9. Order allowing writ of error.

10. Admission of service.

11. This praecipe.

ROBT. C. SAUNDERS,

United States Attorney,

F. C. REAGAN,

Assistant United States Attorney,

Attorneys for Plaintiff. [18]

We waive the provisions of the Act approved February 13, 1911, and direct that you forward typewritten transcript to the Circuit Court of Appeals for printing, as provided under rule 105 of this Court.

ROBT. C. SAUNDERS,

United States Attorney,

F. C. REAGAN,

Assistant United States Attorney,

Attorneys for Plaintiff.

We hereby acknowledge service of copy of the foregoing praecipe, waive the right to request the insertion of any other matters than those incorporated in the foregoing praecipe, and stipulate that the proceedings, papers, orders and documents included in said praecipe constitute a full and sufficient record upon writ of error.

MALCOLM DOUGLAS,

Pros. Atty.,

HOWARD A. HANSON,

Dep. Pros. Atty.,

L. L. THOMPSON,

Atty. Gen'l of Washington,

Attorneys for Defendants.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 6, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [19]

United States District Court, Western District of
Washington, Northern Division.

No. 5926.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KING COUNTY, WASHINGTON, a Municipal
Corporation, CLAUDE C. RAMSAY, LOU
C. SMITH, and THOMAS DOBSON, Indi-
vidually and as County Commissioners for
King County, Washington,

Defendants.

**Certificate of Clerk U. S. District Court to Tran-
script of Record.**

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 19, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the clerk of said

District Court, and that the same constitute the record on return to writ of error herein, from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses and costs incurred in my office on behalf of the plaintiff in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: Clerk's fees (Sec. 828, R. S. U. S.) for mak-

ing record, certificate or return, 42 folios
at 15c\$6.30

[20]

Certificate of Clerk to transcript of record,
4 folios at 15c60
Seal to said certificate20

Total \$7.10

I hereby certify that the above cost for preparing and certifying record, amounting to \$7.10 will be included in my quarterly account to the Government, of fees and emoluments for the quarter ending December 31st, 1921.

I further certify that I hereto attach and herewith transmit the original writ of error, original citation and original acceptance of service of writ of error and citation issued in this cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court,

at Seattle, in said District, this 19th day of October, 1921.

[Seal] F. M. HARSHBERGER,
Clerk United States District Court, Western District of Washington. [21]

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. —.

UNITED STATES OF AMERICA,
Plaintiff in Error,
vs.

KING COUNTY, WASHINGTON, a Municipal
Corporation, CLAUDE C. RAMSAY, LOU
C. SMITH, and THOMAS DOBSON, Indi-
vidually, and as County Commissioners for
King County, Washington,
Defendants in Error.

Citation on Writ of Error.

The United States of America,—ss.

The President of the United States of America, to
Malcolm Douglas, Howard A. Hansen and L. L.
Hunt, Attorneys for Defendants in Error,
GREETING:

You are hereby cited and admonished to be and
appear before the United States Circuit Court of
Appeals for the Ninth Circuit at San Francisco, in
the State of California, within thirty days from the
date hereof, pursuant to a writ of error filed in the

clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein the United States of America is plaintiff in error, and King County, Washington, a municipal corporation, Claude C. Ramsay, Lou C. Smith and Thomas Dobson, individually and as King County Commissioners, are defendants in error, to show cause, if any there be, why judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the party in that behalf.

WITNESS, the Honorable EDWARD E. CUSHMAN, Judge of the District Court of the United States for the Western District of Washington, Northern Division, this 8th day of October, 1921.

[Seal] Attest: EDWARD E. CUSHMAN,
United States District Judge.

[Endorsed]: No. ——. In the Circuit Court of the United States for the Ninth Circuit. United States of America, Plaintiff in Error, vs. King County, Washington, a Corporation, et al., Defendants in Error. Citation on Writ of Error. Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 8, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. 5926.

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

KING COUNTY, WASHINGTON, a Municipal
Corporation, CLAUDE C. RAMSAY, LOU
C. SMITH, and THOMAS DOBSON, Indi-
vidually and as County Commissioners for
King County, Washington,

Defendants in Error.

**Acceptance of Service of Writ of Error and Cita-
tion on Writ of Error.**

Due and timely service of writ of error and cita-
tion on writ of error in the above-entitled cause is
hereby acknowledged this 10th day of October,
1921.

MALCOLM DOUGLAS,

Pros. Atty.,

HOWARD C. HANSON,

Dep. Pros. Atty.,

L. L. THOMPSON,

Atty. Gen'l of Washington,

Attorneys for Defendants in Error.

Copy of within received Oct. 10, 1921.

MALCOLM DOUGLAS,

Prosecuting Attorney.

[Endorsed]: No. ——. In the District Court of the United States for the Western District of Washington, Northern Division. United States of America, Plaintiff in Error, vs. King County, Washington, a Municipal Corporation, et al., Defendants in Error. Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 10, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. —.

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

KING COUNTY, WASHINGTON, a Municipal Corporation, CLAUDE C. RAMSAY, LOU C. SMITH, and THOMAS DOBSON, Individually and as County Commissioners for King County, Washington,

Defendants in Error.

Writ of Error.

The United States of America,—ss.

The President of the United States of America, to the Honorable Judges of the District Court of the United States for the Western District of Washington, Northern Division, GREETING:

Because in the record and proceedings, as also

in the rendition of the judgment of a plea which is in said District Court, before the Honorable Edward E. Cushman, between United States of America, the plaintiff in error, and King County, Washington, a municipal corporation, Claude C. Ramsay, Lou C. Smith and Thomas Dobson, individually and as County Commissioners for King County, Washington, the defendants in error, a manifest error hath happened to the prejudice and great damage of United States of America, plaintiff in error, as by its complaint and petition herein appears, and we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, DO COMMAND YOU, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, State of California, together with this writ, so that you have the same at the said city of San Francisco within thirty days from the date hereof, in said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being then and there inspected, said United States Circuit Court of Appeals may cause further to be done therein to correct the error what of right, and according to the laws and customs of the United States of America should be done in the premises.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 8th

day of October, 1921, and the year of the Independence of the United States, one hundred and forty-fourth.

[Seal] F. M. HARSHBERGER,
Clerk of the District Court of the United States
for the Western District of Washington.

Acceptance of service of within writ of error acknowledged this — day of October, 1921.

_____,
_____,

Attorneys for Defendants in Error.

[Endorsed]: No. —. In the Circuit Court of Appeals of the United States for the Ninth Circuit. United States of America, Plaintiff in Error, vs. King County, Washington, a Municipal Corporation, et al., Defendants in Error. Writ of Error. Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 8, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

[Endorsed]: No. 3790. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Plaintiff in Error, vs. King County, Washington, a Municipal Corporation, Claude C. Ramsey, Lou C. Smith and Thomas Dobson, Individually and as County Commissioners for King County, Washington, Defendants in Error. Transcript of Record. Upon Writ of Error to the

United States District Court of the Western District of Washington, Northern Division.

Filed October 22, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

3790

No. At Law.

**In the United States
Circuit Court of Appeals**

For the Ninth Circuit

THE UNITED STATES OF AMERICA,

Plaintiff-in-Error,

vs.

KING COUNTY, Washington, a Municipal Corporation; Claud C. Ramsey, Lou C. Smith and Thomas Dobson, individually and as County Commissioners for King County, Washington,

Defendants-in-Error.

Writ of Error to the District Court for the Western District of Washington.

HON. EDWARD E. CUSHMAN, *Judge Presiding.*

BRIEF FOR PLAINTIFF-IN-ERROR.

THOMAS P. REVELLE,
United States Attorney.

JOHN A. FRATER,
Assistant United States Attorney.

CARL A. MAPES,
Solicitor of Internal Revenue.

ROBERT M. FOSTER,
*Special Attorney Bureau of Internal Revenue.
Of Counsel.*

In the United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA,
Plaintiff-in-Error,

vs.

KING COUNTY, Washington, a Municipal Corporation; Claud C. Ramsey, Lou C. Smith and Thomas Dobson, individually and as County Commissioners for King County, Washington,
Defendants-in-Error.

Writ of Error to the District Court for the Western
District of Washington.

HON. EDWARD E. CUSHMAN, *Judge Presiding.*

BRIEF FOR PLAINTIFF-IN-ERROR.

STATEMENT OF THE CASE.

This case is before the court on a writ of error to the District Court of the United States for the Western District of Washington, Northern Division, and comprises a suit for the recovery of \$5,719.04 alleged to be due by the defendants in error to the

plaintiff in error on account of the failure of the former to collect certain taxes alleged to be due under Title V of the Revenue Act of 1917 and Title V of the Revenue Act of 1918 with respect to amounts paid to the defendants in error for the transportation of freight and passengers on certain ferry boats maintained and operated by the said defendants in error.

THE FACTS.

King County, Washington, is a municipal corporation organized and existing under the laws of the State of Washington, having its principal office in the City of Seattle, County of King, Washington, and was existing as such from November 1, 1917, to January 1, 1921. Claud C. Ramsay, Lou C. Smith and Thomas Dobson were during the period aforesaid the duly elected, qualified and acting County Commissioners of King County, Washington. The defendants in error during the period aforesaid maintained and operated lines of ferry boats for the transportation of freight and passengers for hire along various routes between the City of Seattle, Washington, and different points within and without the County of King, Washington. During the said period the said defendants

in error collected sums of money from divers persons in payment for services and facilities rendered in transporting passengers and freight on the ferry boats aforesaid. Although being notified by a duly authorized agent of the United States that they should collect and pay over to the Collector of Internal Revenue for the District in which their principal office was located certain taxes with respect to moneys collected as aforesaid, the defendants in error wilfully failed, refused and neglected to collect such taxes or to pay the same to the said Collector of Internal Revenue.

STATUTES INVOLVED.

The pertinent statutes of the State of Washington relating to the powers and duties of Counties are as follows:

“Sec. 3822. Powers of Counties as Bodies Corporate.—The several counties in this state shall have capacity as bodies corporate to sue and be sued in the manner prescribed by law; to purchase and hold lands within its own limits; to make such contracts, and to purchase and hold such personal property, as may be necessary to its corporate or administrative powers, and to do all other necessary acts in relation to all the property of the county. (L. '54, p. 329, Sec. 1; Cd. '81, Sec. 2653; 1 H. C., Sec. 2437.) (Rem. 1915.)

“Sec. 3824. Powers—How Exercised.—Its powers can only be exercised by the county commissioners, or by agents or officers acting under their authority or authority of law. (Cd. '81, Sec. 2655; 1 H. C., Sec. 2459.) (Rem. 1915.)”

“Sec. 5013. County may Construct, Purchase or Condemn, Etc.—Any county within the state shall be and is hereby authorized to construct, or condemn and purchase, or purchase, operate and maintain a ferry across or wharf at any unfordable stream, lake, estuary or bay within or bordering on said county, together with all the necessary boats, grounds, roads, approaches and landings necessary or appertaining thereto, with full jurisdiction and authority to operate and maintain the same free or for toll, by and under the direction and control of the board of county commissioners of such county and as said board shall by resolution determine. (L. '95, p. 341, Sec. 2; L. '99, p. 39, Sec. 1.) (Rem. 1915.)”

The pertinent provisions of the Revenue Act of 1917 follow:

“Sec. 500. That from and after the first day of November, nineteen hundred and seventeen, there shall be levied, assessed, collected, and paid (a) a tax equivalent to three per centum of the amount paid for the transportation by rail or water or by any form of mechanical motor power when in competition with carriers by rail or water of property by freight con-

signed from one point in the United States to another; * * * (c) a tax equivalent to eight per centum of the amount paid for the transportation of persons by rail or water, or by any form of mechanical motor power on a regular established line when in competition with carriers by rail or water, from one point in the United States to another or to any point in Canada or Mexico, where the ticket therefor is sold or issued in the United States, not including the amount paid for commutation or season tickets for trips less than thirty miles, or for transportation the fare for which does not exceed 35 cents, and a tax equivalent to ten per centum of the amount paid for seats, berths, and staterooms in parlor cars, sleeping cars, or on vessels. If a mileage book used for such transportation or accommodation has been purchased before this section takes effect, or if cash fare be paid, the tax imposed by this section shall be collected from the person presenting the mileage book, or paying the cash fare, by the conductor or other agent, when presented for such transportation or accommodation, and the amount so collected shall be paid to the United States in such manner and at such times as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe. * * *

“Sec. 501. That the taxes imposed by section five hundred shall be paid by the person, corporation, partnership, or association paying for the services or facilities rendered.”

“Sec. 502. That no tax shall be imposed under section five hundred upon any payment received for services rendered to the United States, or any State, Territory, or the District of Columbia. The right to exemption under this section shall be evidenced in such manner as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulation prescribe.”

“Sec. 503. That each person, corporation, partnership, or association receiving any payments referred to in section five hundred shall collect the amount of the tax, if any, imposed by such section from the person, corporation, partnership, or association making such payments, and shall make monthly returns under oath, in duplicate, and pay the taxes so collected and the taxes imposed upon it under paragraph two of section five hundred and one to the collector of internal revenue of the district in which the principal office or place of business is located. Such returns shall contain such information, and be made in such manner, as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulation prescribe.”

The Revenue Act of 1918 provides:

“Sec. 500. That from and after April 1, 1919, there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by section 500 of the Revenue Act of 1917—

(a) A tax equivalent to 3 per centum of the

amount paid for the transportation on or after such date, by rail or water or by any form of mechanical motor power when in competition with carriers by rail or water, of property by freight transported from one point in the United States to another; * * *

(c) A tax equivalent to 8 per centum of the amount paid for the transportation on or after such date of persons by rail or water, or by any form of mechanical motor power on a regular established line when in competition with carriers by rail or water from one point in the United States to another or to any point in Canada or Mexico, where the ticket or order therefor is sold or issued in the United States, not including the amount paid for commutation or season tickets for trips less than thirty miles, or for transportation the fare for which does not exceed 42 cents; * * *

(h) No tax shall be imposed under this section upon any payment received for services rendered to the United States or to any State or Territory or the District of Columbia. The right to exemption under this subdivision shall be evidenced in such manner as the Commissioner, with the approval of the Secretary, may by regulation prescribe."

"Sec. 501. (a) That the taxes imposed by section 500 shall be paid by the person paying for the services or facilities rendered."

"Sec. 502. That each person receiving any payments referred to in section 500 shall collect the amount of the tax, if any, imposed by

such section from the person making such payments, and shall make monthly returns under oath, in duplicate, and pay the taxes so collected and the taxes imposed upon it under subdivision (c) or (d) of section 501 to the collector of the district in which the principal office or place of business is located."

THE ARGUMENT.

INTRODUCTORY.

There is only one point in dispute in this case, namely, whether a municipal corporation may constitutionally be required and is required, under the provisions of the Revenue Act of 1917 and the Revenue Act of 1918, to collect and pay over to the United States a tax with respect to amounts paid to such corporation for the transportation of passengers and freight on ferry lines maintained and operated by it. It is contended by the defendants in error that since King County, Washington, is a subdivision of the State of Washington the County Commissioners are officers and agents of the State engaged in the operation of a governmental enterprise and, hence, King County, its officers and agents are exempt from any Federal burden with respect to the conduct of such enterprise. On the other hand, the Government maintains that the operation

of a ferry, under the circumstances prevailing in the instant case, is a municipal or corporate, as distinguished from a purely governmental function and, hence, is not within the constitutional inhibition against the taxation of State instrumentalities by the Federal Government. It is further contended that even though it be conceded that the operation of the ferries in the instant case is a purely governmental function, engaged in by the defendants in error for the benefit of the public at large, the tax in question is imposed, not upon the State or a subdivision thereof, but upon the persons paying for the transportation services and facilities rendered by the defendants in error, and that the defendants in error could be, and were, required to collect the tax due with respect to the moneys so paid and received by them and pay the same over to the United States.

NOT EXEMPTED BY THE ACT.

It is not claimed that the defendants in error are within any express exemption from the provisions of the taxing acts above quoted, but it is argued that an implied exemption is found in the language of Section 502 of the Revenue Act of 1917 and Section 500 (h) of the Revenue Act of 1918. If there

is any inference to be drawn from these provisions beyond the plain words used, it is that the exemption with respect to states therein provided is exclusive, and this exemption refers, in each case, *to amounts paid for services rendered to any State* and could not by any normal construction be held to apply to *amounts paid to a State for services rendered to private individuals*. These provisions were clearly inserted to avoid any constitutional objections to the Acts on the ground that they attempted to impose a tax on the expenditures of States. As will be pointed out later, the transportation tax is an excise tax, a tax on expenditures and there is no constitutional reason for assuming that Congress intended to exempt expenditures made *by individuals* in those cases where the payments were made *to States* or subdivisions thereof.

THE TAXING POWER OF CONGRESS.

But, it is claimed, that if these Acts are so construed as to impose upon the defendants in error the burden of paying the tax in question, the same are violative of that settled principle of the Federal Constitution which prevents the Federal Government from taxing the instrumentalities of the States. Thus it is sought to restrict the taxing power of

Congress. Of course Congress is a legislative body with delegated powers but the power to levy taxes, duties, imposts and excises, is expressly given in the Constitution and in the exercise of such power, as limited by the Constitution itself, the will of the legislative body furnishes the only restraint. As was stated in the case of *Veazie Bank v. Fenno*, 8 Wallace 533:

“Nothing is clearer, from the discussions in the Convention and the discussions which preceded final ratification by the necessary number of States, than the purpose to give this power to Congress, as to the taxation of everything except exports, in its fullest extent. This purpose is apparent, also, from the terms in which the taxing power is granted. The power is ‘to lay and collect taxes, duties, imposts and excises, to pay the debt and provide for the common defense and general welfare of the United States.’ More comprehensive words could not have been used. * * * There are, indeed, certain virtual limitations, arising from the principles of the Constitution itself. It would undoubtedly be an abuse of the power if so exercised as to impair the separate existence and independent self-government of the States, or if exercised for ends inconsistent with the limited grants of power in the Constitution. * * * The comprehensiveness of the power, thus given to Congress, may serve to explain, at least, the absence of any attempt

by members of the Convention to define, even in debate, the terms of the grant. The words used certainly describe the whole power, and it was the intention of the Convention that the whole power should be conferred."

Quoting from the opinion of the Court in the *License Tax Cases*, 5 Wall. 462, 471:

"It is true that the power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion."

Any attempt therefore to circumscribe or limit the taxing power of Congress must be based upon the limitations expressly prescribed in the Constitution itself or arising by necessary implication. See *Pollock v. Farmers Loan and Trust Co.*, 157 U. S. 429.

LIMITATIONS ON THE TAXING POWER OF CONGRESS.

There are certain expressed limitations on the taxing power of Congress with which we are not at present concerned but as pointed out by Chief Justice Marshall in the case of *McCulloch v. Mary-*

land, 4 Wheat. 316, that which is implied is as much a part of the Constitution as that which is expressed and from the very nature of the dual form of Government created by the Constitution itself there arises the implied limitation on this power with which we are at present concerned. However it may be variously stated, this restriction prohibits the taxation by the Federal Government of the States with respect to their purely governmental functions. That the restriction is itself thus limited is apparent from an examination of those cases wherein the taxing power of Congress has been challenged on this basis.

The principle as announced and sustained by various subsequent decisions emanates from that memorable observation by the Chief Justice in *McCulloch v. Maryland*, *supra*, "That the power to tax involves the power to destroy." In that case the Chief Justice observed that the Federal Government by necessary implication was prohibited from destroying through taxation the powers reserved by the States and that "the reserved rights of the States, such as the right to pass laws; to give effect to laws through executive action; to administer justice through the courts; and to employ all necessary agencies for legitimate purposes of State gov-

ernment, are not proper subjects of the taxing power of Congress.”

The scope of this prohibition, as thus announced, has not been extended by subsequent decisions. In *Collector v. Day*, 11 Wall. 127, it was held that it was not competent for Congress to levy a tax upon the salaries of judicial officers of a State, for the same reasons that it was held in *Dobbins v. Commissioners*, 16 Pet. 435, that a State could not tax the salaries of officers of the United States. The limitation was thus explained by the court:

“It is admitted that there is no expressed provision in the Constitution that prohibits the General Government from taxing the means and instrumentalities of the State, nor is there any prohibiting the States from taxing the means and instrumentalities of that Government. In both cases the exemption rests upon necessary implication and is upheld by the great law of self preservation; as any Government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that Government. Of what avail are these means if another power may tax them at discretion?”

In *United States v. Railroad Company*, 17 Wall. 322, the limitation was held to apply to municipal

revenues derived by the City of Baltimore from its ownership of stock in a railroad company. The reason for this ruling was thus stated by Mr. Justice Hunt:

“The right of the States to administer their own affairs through their legislative, executive, and judicial departments, in their own manner through their own agencies, is conceded by the uniform decisions of this court and by the practice of the Federal Government from its organization. This carries with it an exemption of those agencies and instruments, from the taxing power of the Federal Government. If they may be taxed lightly, they may be taxed heavily; if justly, oppressively, if any interference is permitted. Hence, the beginning of such taxation is not allowed on the one side, is not claimed on the other.”

There was a like holding in the case of *Pollock v. Farmers' Loan and Trust Company*, *supra*, wherein the interest received from bonds issued by a State or any of its municipalities, were declared to be beyond the taxing power of Congress, for the reason that such a tax would impair the power of the State to borrow money, which was an inherent attribute of sovereignty, as well as one of the “reserved” powers of a State. (See also, *Mercantile Bank v. New York*, 121 U. S. 13, 162; *Weston v.*

Charleston, 2 Pet. 449, 468; *Evans v. Gore*, 253 U. S. 245, 255.)

Whatever may have been the law prior to the decision in the case of *South Carolina v. United States*, 199 U. S. 437, it was settled by that case that the exemption of State agencies and instrumentalities from National taxation is limited to those which are of a strictly governmental character and does not extend to those which are used by the State in the carrying on of an ordinary private business. It was stated in the dissenting opinion in that case delivered by Mr. Justice White that by the decision the court had virtually overruled its former position on the question. As a matter of fact the precise question had never been presented to the court and although there is some suggestion in former cases that the States' exemption from Federal taxation was complete, all the cases theretofore decided involved the taxation by the Federal Government of instrumentalities of the State employed in purely governmental enterprises or the tax under consideration was such as to constitute a burden on some sovereign power of a State. That such was the boundary of this prohibition on the taxing power of Congress, was voiced as early as the decision in *Collector v. Day*, *supra*, when Mr.

Justice Bradley facetiously remarked in his dissenting opinion:

“Where are we to stop in enumerating the functions of the State Governments which will be interfered with by Federal taxation? If a State incorporates a railroad to carry out its purposes of internal improvement, or a bank to aid its financial arrangements, reserving, perhaps a percentage of the stock or profits, for the supply of its own treasury, will the bonds or stock of such an institution be free from Federal taxation? * * * I am as much opposed as anyone can be to any interference by the Federal Government with the just powers of the State Government.”

Again in the *United States v. Railroad Company*, *supra*, it was said:

“We admit the proposition of the counsel that the revenue must be municipal in its nature to entitle it to the exception claim. Thus, if an individual should make the City of Baltimore his agent and trustee to receive funds, and to distribute them in aid of science, literature, or the fine arts, or even for the relief of the destitute and infirm, it is quite possible that such revenues would be subject to taxation. The corporation would therein depart from its municipal character, and assume the position of a private trustee. It would occupy a place which an individual could occupy with equal propriety. It would not in that action

be an auxiliary or servant of the State, but of the individual creating the trust. There is nothing of a governmental character in such a position. * * *"

The same suggestion is made in *Ambrosini v. United States*, 187 U. S. 1, 8:

"The question is whether the bonds were taken in the exercise of a function strictly belonging to the State and City in their ordinary governmental capacity. * * *"

In the *South Carolina* decision it is made clear that the broad taxing power of Congress had always theretofore been restricted in this respect from impairing only those powers "reserved" to the States upon the adoption of the Constitution or those powers inherently attaching to a sovereign and that those functions which were ordinarily performed by individuals belonged to neither of these classes. It was observed that the decision in the case of *Veazie Bank v. Fenno*, *supra*, was necessarily placed on the ground that the issuance of notes used for circulation was neither a sovereign nor a reserved power of a State, nor employed as an agency for a legitimate purpose of State government.

After reviewing the various decisions on the point Mr. Justice Brewer concluded for the court:

“These decisions while not controlling the question before us, indicate that the thought has been that the exemption of State agencies and instrumentalities from National taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the State in the carrying on of an ordinary private business.”

OPERATION *of* FERRIES AS PRIVATE OR GOVERNMENTAL FUNCTION.

Now since we must consider it settled that the exemption of State agencies from Federal taxation does not extend to those means or instrumentalities employed in the performance of its private functions, it is to be determined whether or not the operation of ferries by the defendants in error was, under the circumstances prevailing in the instant case, a private or corporate function as distinguished from purely governmental.

Now, King County is a body corporate with power to sue and be sued in its corporate name and, in general, occupies the same status and exercises the same powers as other municipal corporations (Sec. 3822, Rem. 1915). True, it is a subdivision of a State but, as other municipal corporations, has a dual character, the one public and the other private,

and exercises, correspondingly, twofold functions and duties. The one class of its powers is of a public character, in the exercise of which, its functions are political and governmental and such powers are exercised by virtue of its attributes of sovereignty. The other class of powers and functions relates to special or private corporate purposes, in the accomplishment of which it acts, not through its public officers *as such*, but through agents or servants employed by it. This dual character of municipal corporations is recognized in a long line of decisions: *Lynch v. North Yakima*, 37 Wash. 657, 80 Pac. 79; *Simpson v. Whatcom*, 33 Wash. 392, 74 Pac. 577; *Russell v. Tacoma*, 8 Wash. 156, 35 Pac. 605; *Kansas City v. Lemen*, 57 Fed. 905; *Hart v. Bridgeport*, 11 Fed. Cas. No. 6, 149, 13 Blatchf, 289; *Denver v. Porter*, 126 Fed. 288, and it is very generally held that in the exercise of its corporate or private functions, a municipal corporation stands upon the same footing and is charged with the same responsibility as a private corporation. *Normile v. Ballard*, 33 Wash. 369, 74 Pac. 566; *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 273; *Denver v. Porter*, 126 Fed. 288; *South Carolina v. United States*, *supra*, and authorities cited. Not only does a municipal corporation occupy

the same status with respect to its responsibility for its acts as a private corporation in the exercise of its corporate functions but, as held in the *South Carolina* case, it is subject, in the same manner and to the same extent, to taxation by the Federal Government. After reviewing various decisions on the question the court said:

“Now, if it be well established as these authorities say, that there is a clear distinction as respects responsibility for negligence between the powers granted to a corporation for governmental purposes and those in aid of private business, a like distinction may be recognized when we are asked to limit the full power of imposing excises granted to the National Government by an implied inability to impede or embarrass a State in the discharge of its functions. It is reasonable to hold that while the former may do nothing by taxation in any form to prevent the full discharge by the latter of its governmental functions, yet whenever a State engages in a business which is of a private nature that business is not withdrawn from the taxing power of the Nation.”

While the distinction between the two classes of functions above discussed and the liability of a municipal corporation in the performance of each, is thoroughly established by the authorities, the decisions are not harmonious in designating the class

to which particular powers or functions belong. The same function has been held to be public in one case and private in another, while there is practical unanimity of opinion as to the application of the principle to other powers and duties.

However, eliminating those functions that have been the subject of conflicting decisions which might be termed as "border line" cases, some principles have been enunciated which are helpful in classifying particular powers and duties as public or private. Some of these principles will be enumerated:

1. Thus it is generally held that those powers *voluntarily* assumed and exercised by a municipal corporation and not imposed upon it as a *duty* of a sovereign to the general public, are private and corporate, although the exercise of such powers might and do inure ultimately to the benefit of the general public. *Oliver v. Worcester*, 102 Mass. 489; *Galveston Rosnain-sky*, 62 Tex. 118; *White Lead Co. v. Rochester*, 3 N. Y. 463; *Hart v. Bridgeport*, *supra*; *Taggart v. Fall River*, 175 Mass. 325, 49 N. E. 622; *Barron v. Detroit* (Mich.), 40 L. R. A. 526.

2. Other functions are held to be private when they are performed for the immediate benefit or advantage of the corporation or the inhabitants of a particular locality although the general public may derive a common benefit therefrom. *Western Saving Fund Society*

v. Philadelphia, 31 Pa. St. 175; *Kansas City v. Lemen*, 57 Fed. 905; *Eastman v. Meredith*, 36 N. H. 284; *Maxmillion v. Mayor*, 62 N. Y. 160; *Esberg-Gunst Cigar Co. v. Portland*, 34 Ore. 282, 55 Pac. 961; *Wagner v. Portland*, 40 Ore. 389, 67 Pac. 300; *Hart v. Bridgeport*, *supra*; *Hill v. Boston*, 122 Mass. 344; *Bailey v. New York*, 3 Hill. 531; *Western College v. Cleveland*, 12 Ohio St. 377.

3. Again the fact that a municipal corporation makes a charge for services or facilities has been held sufficient to classify the furnishing of such services or facilities as a private function. *Esberg-Gunst Cigar Co. v. Portland*, *supra*; *People v. Detroit*, 28 Mich. 237; *Arline v. Laurens County*, 77 Ga. 249; *Lynch v. Springfield*, 174 Mass. 430; *Bodge v. Philadelphia*, 167 Pa. St. 492; *Kibell v. Philadelphia*, 105 Pa. St. 41; *Aldrich v. Tripp*, 11 R. I. 141; *Pittsburgh v. Grier*, 22 Pa. St. 54; *St. John v. MacDonald*, 14 Cn. Supt. Ct. 1.

4. Further, those functions which can be or are ordinarily performed by individuals, are generally held to be private in their nature. (See authorities cited above.)

Applying the foregoing principles to the operation of ferries, there can be little doubt that such an undertaking is properly classified, especially in the instant case, as a private, rather than a purely governmental, function. This is a *permissive power* granted and voluntarily assumed and not a *duty* im-

posed upon King County in its capacity as a local sovereign. It is a function in the accomplishment of which an individual is legally as competent to act as a sovereign. It was undertaken for the immediate advantage and benefit of the corporation and the inhabitants of local and adjacent territory, although it no doubt resulted in a common benefit to the public at large. The enterprise was undertaken by the corporation in its corporate and proprietary capacity and a charge was made for the services and facilities furnished.

The distinctions above made have been fully recognized and applied by the Supreme Court of the State of Washington and it is submitted that the decisions of this court are controlling so far as they classify the various functions performed by municipal corporations.

Thus, it has been held that the laying out, repair and control of streets by a municipal corporation are municipal and ministerial duties as distinguished from governmental duties, for a breach of which the corporation is liable. *Sutton v. Snohomish*, *supra*; *Normile v. Ballard*, 33 Wash. 369, 74 Pac. 566.

Likewise the laying out and constructing of high-

ways when performed by a county is not such a governmental function as relieves the county from liability to persons injured by negligence in constructing such highways. *Wendel v. Spokane County*, 27 Wash. 121, 67 Pac. 576.

Although there appear to be few decided cases relating to the operation of ferries, it has been held that a city in operating a ferry was acting as a common carrier and must be held to the ordinary duties and liabilities of a carrier. *Townsend v. Boston*, 187 Mass. 283, 72 N. E. 991. The liability of such municipal corporation as a common carrier is indisputable where it maintains a ferry and charges tolls for the services furnished. *Pittsburgh v. Grier*, 22 Pa. St. 54; *St. John v. MacDonald*, *supra*.

Conceding, therefore, the correctness of the suggestion that has been made that a ferry is a part of the highways of the county, a proposition which has been denied in a number of cases, it will be seen that the defendants in error cannot escape taxation on this ground for the reason that a municipal corporation in the State of Washington acts in its private corporate capacity in the maintenance of a highway and not in the discharge of a purely governmental function.

The proposition announced in the District Court, that the operation of a ferry is a governmental function, appears to have been based on the cases of *East Hartford v. Hartford Bridge Co.*, 10 How. 511, and *Slaughter House Cases*, 16 Wall. 36. Neither of these cases appears to be in point. The *East Hartford* case holds that the control of the location and operation of ferries was within the province of the State legislature and that a legislature could not by granting a franchise to a municipal corporation create such a contract right as would be impaired by the granting of a later franchise to another corporation. The *Slaughter House* cases merely decided that since the regulation of slaughter houses was within the police power of the State there was no taking of property without due process of law by granting exclusive franchises to a few persons and forbidding the conduct of such business by any other person.

There is a vast distinction between the control of a business and the operation of the business itself by the State. The authority of a State to legislate for the purpose of regulating the method of operating various businesses pursuant to its police power has often been sustained. In the *South Carolina* case it was determined by the court that the

regulation of the liquor business was a proper subject for the exercise of the police power of the State, and yet it was held that when the State engaged in the business itself it was performing a private, rather than a governmental, function. It is customary for municipal corporations to control the public utilities, to supervise show houses, to regulate the size and construction of buildings in various sections of the city pursuant to what are generally termed "zoning laws;" and yet it could never be contended that the operation of a show house or the building of residences in restricted areas are governmental functions although undertaken by a municipal corporation. The conclusion of the District Court seems to have been based on the failure to distinguish between the *regulation* of business and the *operation* of business.

THE TAX IS NOT ON THE STATE OR SUBDIVISION
THEREOF.

Now let it be conceded for the purposes of argument, that the operation of ferries under the circumstances prevailing in the instant case is a purely governmental function and that the defendants in error are not themselves subject to taxation with respect to such enterprise, it is yet not attempted by the taxing acts in question to violate the exemp-

tion granted to State instrumentalities. As has been suggested above, the transportation tax is an excise tax imposed upon expenditures made by persons for transportation services or facilities. It is specifically provided by section 501 of the Revenue Act of 1917 that,

“* * * the taxes imposed by section five hundred *shall be paid by the person, corporation, partnership, or association paying for the services or facilities rendered,*”

and by section 501 (a) of the Revenue Act of 1918 that,

“* * * the taxes imposed by section five hundred *shall be paid by the person paying for the services or facilities rendered.*”

Plainer language could not have been used in designating the person upon whom the tax is imposed. It is not contemplated by either act that the carrier should bear any part of the tax burden. True, the carrier is required to *collect* the tax and pay over the same to the collector, but this very requirement only makes it more conclusive that the tax is imposed upon the person paying for the transportation services. Thus it is provided by section 503 of the Revenue Act of 1917 that,

“* * * each person, corporation, partnership, or association *receiving any payments* referred

to in section five hundred *shall collect the amount of the tax*, if any, imposed by such section *from the person, corporation, partnership, or association making such payments*, and shall make monthly returns under oath, in duplicate, and pay the taxes so collected * * * to the collector * * *."

So also it is provided by section 502 of the Revenue Act of 1918 that,

"* * * each person receiving any payments referred to in section 500 *shall collect the amount of the tax*, if any, imposed by such section *from the person making such payments*, and shall make monthly returns under oath, in duplicate, and pay the taxes so collected * * * to the collector * * *."

It is submitted that even a casual examination of the foregoing provisions will remove any doubt that the tax is under neither act imposed upon the carrier, but that it is merely charged with the collection of the same.

REQUIREMENT OF COLLECTION.

Although the Federal Government cannot tax instrumentalities of the State employed in purely governmental functions, there is no objection to requiring the State through its officers or agents to collect the tax due from persons paying money over

to such agents. This is well illustrated by the case of *National Bank v. Commonwealth*, 9 Wall. 353. After it had been held that a National Bank or its capital could not be subjected to taxation by a State, it was held in this case that there was no Constitutional objection to requiring a National Bank to collect a tax imposed upon the shareholders of the Bank and to pay the same over to the State Government. It was argued in that case that:

“Without remuneration, and without right, the commonwealth of Kentucky is undertaking to force the plaintiff in error, in its corporate capacity, to collect this tax from its shareholders, and pay the same into the State treasury. Not only so, but penalties of a grave and serious character are imposed upon the bank and its officers in the event of neglect or refusal. Can this burden be imposed? * * * With great propriety the bank may say to the State: ‘You have your assessing officers; send them to the bank; they will there find a list of all stockholders, let them assess for themselves the shares of stock for taxation; but you shall not transform our National agency into a State servant, and compel it to perform a burdensome duty, not enjoined by its charter.’ ”

In that case the law provided that if the tax was not paid the Cashier and his securities should be liable for the same, and twenty per cent, upon the amount and that the bank or corporation should

forfeit the privileges of its charter. In reply to this argument the court stated:

“But it is argued that the banks, being instrumentalities of the Federal government, by which some of its important operations are conducted, cannot be subjected to such State legislation. It is certainly true that the Bank of the United States and its capital were held to be exempt from State taxation on the ground here stated, and this principle, laid down in the case of *McCulloch v. The State of Maryland*, has been repeatedly affirmed by the court. But the doctrine has its foundation in the proposition, that the right of taxation may be so used in such cases as to destroy the instrumentalities by which the Government proposes to effect its lawful purposes in the States, and it certainly cannot be maintained that banks or other corporations or instrumentalities of the Government are to be wholly withdrawn from the operation of State legislation. The most important agents of the Federal government are its officers, but no one will contend that when a man becomes an officer of the Government he ceases to be subject to the laws of the State. The principle we are discussing has its limitation, a limitation growing out of the necessity on which the principle itself is founded. That limitation is, that the agencies of the Federal government are only exempted from State legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are

designed to serve that Government. Any other rule would convert a principle founded alone in the necessity of securing to the Government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the States. * * * It is only when the State law incapacitates the banks from discharging their duties to the Government that it becomes unconstitutional. * * * If the State of Kentucky had a claim against a stockholder of the bank who was a non-resident of the State, it could undoubtedly collect the claim by legal proceeding, in which the bank could be attached or garnisheed, and made to pay the debt out of the means of its shareholder under its control. This is, in effect, what the law of Kentucky does in regard to the tax of the State on the bank shares. It is no greater interference with the functions of the bank than any other legal proceeding to which its business operations may subject it, and it in no manner hinders it from performing all the duties of financial agent of the Government."

This case was cited with approval in a subsequent decision in the case of *Merchants' & Manufacturers' Bank v. Pennsylvania*, 167 U. S. 461, wherein it was pointedly held that a State had the right to make a National Bank its agent for the collection of a tax due from its individual stockholders.

Since, therefore, there is no objection to requiring

officers of a National Bank to collect a tax imposed by the State upon shareholders of the bank, there can certainly be no objection to requiring officers of a State or municipal corporation to collect and pay over to the United States taxes due with respect to money received by such officers in the ordinary course of business. This requirement in no way impairs their efficiency as agents of the State in the performance of their regular duties and is not within the reason of the rule which exempts States from taxation by the Federal Government. It can in no way impede or burden the operation of the ferry. If agents of the Federal Government may be compelled by State legislation, under penalty, to collect taxes due the State from individuals with whom such agents deal, conversely, and for identical reasons, officers and agents of the State are to the same extent amenable to Federal legislation and equally liable for failure to conform thereto.

LIABILITY FOR FAILURE TO COLLECT.

Now, if the foregoing propositions, or any of them, are sound, there was a duty imposed by law upon the defendants in error to collect a tax from the persons paying for the services and facilities furnished by them with respect to the payments so made. Failing in this duty they must be pre-

sumed to have elected to waive collection of the tax and to pay the same themselves.

But beyond any common law liability of the defendants in error arising as a result of the loss sustained by the Government on account of their failure to collect the taxes as aforesaid, there is a liability specifically imposed by the Revenue Act of 1918, which provides:

“Sec. 1308 (a) That any person required under Titles V, VI, VII, VIII, IX, X, or XII, to pay, or to collect, account for and pay over any tax, or required by law or regulations made under authority thereof to make a return or supply any information for the purposes of the computation, assessment or collection of any such tax, who fails to pay, collect, or truly account for and pay over any such tax, make any such return or supply any such information at the time or times required by law or regulation shall in addition to other penalties provided by law be subject to a penalty of not more than \$1,000. * * *

(c) Any person who wilfully refuses to pay, collect, or truly account for and pay over any such tax shall in addition to other penalties provided by law be liable to a penalty of the amount of the tax evaded, or not paid, collected, or accounted for and paid over, to be assessed and collected in the same manner as taxes are assessed and collected. * * *”

Thus the Government looks only to the carrier. This penalty is imposed and this method of collection is employed not only as a matter of convenience but from the necessity of circumstances, arising from the fact that the cost of collection of the tax from the individuals paying for the facilities would exceed the amount of the tax collected. It was, therefore, competent for Congress to provide as it did that the tax should be collected in the manner aforesaid and to hold the carrier to a strict accounting for the amount of tax due.

CONCLUSION.

In conclusion the plaintiff in error submits that the decision of the District Court should be reversed because:

1. The defendants in error are not exempted from the provisions of the taxing acts in question.
2. The exemption of State agencies and instrumentalities from Federal taxation extends only to those employed in purely governmental functions and has no application to those employed by a municipal corporation in its corporate or proprietary capacity.
3. The operation of ferries, especially in the instant case, is a corporate or municipal, rather than a purely governmental, function and hence the agencies employed in such enterprise are not within the exempted class.

4. Conceding the operation of ferries to be a purely governmental function, the principle prohibiting Federal taxation of the governmental agencies of the State is not violated by the taxing acts in question, since the tax is imposed upon the person paying for the transportation services or facilities furnished and not upon the carrier furnishing such services or facilities.

5. There is no objection, constitutional or otherwise, to requiring purely governmental or other agencies of a State, to collect and pay over a tax due to the Federal Government with respect to moneys coming into the hands of such agents in the ordinary course of business.

6. On account of the wilful failure or refusal of such agents to perform the duty thus imposed, there arises a statutory, if not a common law, liability to the Federal Government for the amount of the tax which they have so failed or refused to collect.

Respectfully submitted,

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Of Counsel.*

United States
Circuit Court of Appeals
For The Ninth Circuit

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

v.

KING COUNTY, WASHINGTON, a Municipal Corporation,
CLAUDE C. RAMSAY, LOU C. SMITH and
THOMAS DOBSON, Individually and as County
Commissioners for King County, Washington,
Defendants in Error.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT
OF WASHINGTON.

HON. EDWARD E. CUSHMAN, *Judge.*

BRIEF OF DEFENDANTS IN ERROR

MALCOLM DOUGLAS,
HOWARD A. HANSON,
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Address:

431 County-City Building, Seattle, Washington.

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THE UNITED STATES OF AMERICA,
Plaintiff in Error,

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Defendants in Error.

No. 3790

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT
OF WASHINGTON.

HON. EDWARD E. CUSHMAN, *Judge.*

BRIEF OF DEFENDANTS IN ERROR

STATEMENT OF THE CASE.

During the period from November 1, 1917 to January 1, 1921, King County, one of the political subdivisions of the State of Washington, owned,

maintained and operated for the public benefit a system of public ferries for the transportation of freight and passengers on various routes between the City of Seattle and different points within and without said county and entirely within the State of Washington. The other defendants in error constitute the members of its Board of County Commissioners.

The complaint alleges that under the Acts of Congress of October 3, 1917, and February 4, 1919, a tax shall be levied, assessed, collected and paid. Said tax to be based upon the amount paid for transportation, by the persons paying for the services or facilities rendered, and that the persons receiving such payments should collect the tax and make monthly returns, and pay over the tax so collected to the Collector of Internal Revenue for the district in which said services were rendered, and that defendants in error and each of them wilfully failed, refused and neglected to make such collections and make such returns from November 1, 1917, to January 1, 1921, as required by law to the Collector of Internal Revenue of the District of Washington, monthly or at any other time by reason of which it is alleged that plaintiff in error has been deprived of the sum of Five Thousand Seven Hundred Nineteen Dollars Four Cents (\$5,719.04), and that defendants in error and each of them are, by said Acts of Congress, liable in the sum of Five Thousand Seven Hundred Nineteen Dollars Four Cents (\$5,719.04). (Tr. pp. 2-4.)

To this complaint a demurrer was interposed upon the following grounds:

I.

That it appears from the facts of said bill of complaint that the Court has no jurisdiction of the subject matter of said action.

II.

That the said bill of complaint does not state facts sufficient to constitute a cause of action.

III.

That there is a misjoinder of parties defendant in the above-entitled action in that the defendants Claude C. Ramsay, Lou C. Smith, and Thomas Dobson are each impleaded individually.

IV.

That there is a misjoinder of parties defendant in the above-entitled action in that the defendants Claude C. Ramsay, Lou C. Smith and Thomas Dobson are each impleaded as County Commissioners for King County, Washington. (Tr. p. 6.)

Upon argument and submission of the demurrer, the court took the same under advisement and later filed a memorandum decision as follows:

“CUSHMAN, D. J.

“The United States sues to recover from King County and the County Commissioners, a transportation tax, of which it alleges it has been deprived, and which accrued on account of amounts paid for the transportation of freight and passengers on certain ferry-boats maintained and operated by the County.

“In the maintenance and operation of ferries,

the county and its officers are not engaged in a private business, but, on the contrary, are acting in a state and county governmental capacity and for the benefit of the public.

Slaughter-House Cases, 16 Wall. (83 U. S.) 36 at 88;

East Hartford vs. Hartford Bridge Co., 10 How. (51 U. S.) 511.

"Therefore, *So. Carolina vs. U. S.* (199 U. S. 437) is not in point.

"The rule is well recognized that the Government will not tax the State on account of its governmental acts and agencies in the discharge of its duty to the public.

U. S. v. B. & O. R. R. Co., 17 Wall. 322;

Collector v. Day, 78 U. S. (11 Wall.) 113;

Mercantile Bank v. N. Y., 121 U. S. 138;

Van Brocklin v. Tennessee, 117 U. S. 151;

Georgia v. Atkins, 1 Abbott, 22;

Pollock v. Farmers L. & T. Co., 157 U. S. 429;

Evans v. Gore, 253 U. S. 245;

Dobbins v. Commissioners of Erie, 16 Peters, 435.

"Before any statute will be held to have contemplated, or undertaken to authorize the collection by the Federal government of a tax from the county—a governmental subdivision of the State—on account of its action in discharging its duty to the public, in a matter resting within its governmental authority to

such an extent as does the maintenance and operation of a ferry, such intent would have to be clearly and explicitly expressed in the statute, which is not true in the present case.

“Having reached this conclusion, it is unnecessary to determine whether the government has, or has not such an authority.

“The demurrer will be sustained.” (Tr. pp. 8-9.)

Thereupon the court made and entered an order sustaining the demurrer and Judgment of Dismissal. (Tr. pp. 13-14).

Thereafter the case was brought to this court by the United States on writ of error proceedings.

ARGUMENT.

Two main questions are presented in this case:

(1) Whether the government has power to impose a tax burden upon a state or its political subdivisions;

(2) Whether it was the intent of Congress that the federal acts above mentioned should apply to states and their political subdivisions.

I.

THE POWERS OF KING COUNTY AS TO PUBLIC FERRIES.

King County has for many years operated a system of public ferries under direct statutory authority.

The Act of 1895 p. 341 provides:

“An Act authorizing cities, towns and coun-

ties to purchase, construct and maintain ferries.

“Section 1. That any incorporated city or town within this state be and is hereby authorized to construct, or condemn and purchase, or purchase and to maintain, a ferry across any unfordable stream adjoining and within one mile of the limits of such city or town, together with all necessary grounds, roads, approaches and landings necessary or appertaining thereto located within one mile of the limits of such city or town, with full jurisdiction and authority to manage, regulate and control the same beyond the limits of the corporation, and to operate the same free or for toll.

“Section 2. That any county within the state be and is hereby authorized to construct, or condemn and purchase, or purchase and to maintain, a ferry across any unfordable stream, together with all necessary grounds, roads, approaches and landings necessary or appertaining thereto, with full jurisdiction and authority, and to operate the same free or for toll.”

The Act of 1919 p. 282 provides:

“An Act relating to the powers of counties, authorizing the acquisition and operation of ferries and amending section 5013 of Remington & Ballinger’s Annotated Codes and Statutes of Washington.

“Section 1. That section 5013 of Rem. & Bal. Code be amended to read as follows:

“Section 5013. Any county within the state be and is hereby authorized to construct, condemn, or purchase, operate and maintain ferries or boats across, or wharf at, any unfordable stream, lake, estuary or bay within or bordering on said county, or across any body of water separating portions of such county or separating such county from other counties, together with all the necessary boats, grounds, roads, approaches and landings necessary or appertaining thereto, with full jurisdiction and authority to operate and maintain the same free or for toll, by and under the direction and control of the board of county commissioners of such county and as said board shall by resolution determine.”

The power thus conferred is *not* with any limitation that they must be operated at a profit, but with full authority to operate the same *free or for toll* as the County Commissioners may determine. This power carries with it authority to levy taxes for free ferries or for such sums, as together with any schedule of tolls, may be needed.

The right to determine whether such operation shall be free, for less than cost, or at a profit rests solely within the discretion of the County Commissioners.

The purpose of the state law is that the ferries shall be operated and maintained as a governmental agency of the state for the benefit of the public by providing means for public travel by water.

II.

THE BURDEN SOUGHT TO BE IMPOSED BY THE
GOVERNMENT UPON KING COUNTY IS A
SUBSTANTIAL ONE.

The government suggests that it is the person who pays for transportation upon whom the burden of the war tax falls, and not the county. But that is not the burden complained of. It costs money and takes time to collect these war taxes, to keep accounts thereof, and to remit the same. This is one of the burdens which we contend cannot be imposed upon the county.

Then, if the collection be not made, the government seeks judgment against the county for the sum which it is claimed should have been collected. If such a judgment be rendered, it can be satisfied only by the levy and collection of general taxes upon the taxable property of the county. This is the other burden complained of. Both are real and substantial burdens. By law, the auditor of the county keeps the books of account of its ferry system and the county treasurer collects and disburses its funds. Both of these offices are maintained entirely by general taxation.

III.

THE REVENUE ACT DOES NOT APPLY TO THE STATES
OR POLITICAL SUBDIVISIONS THEREOF.

A.

It is well recognized that counties are political subdivisions of the state. In 7 R. C. L. p. 925, it is stated that

“The principal purpose in establishing counties is to make effectual the political organization and civil administration of the state, in respect to its general purposes and policy which require local direction, supervision and control, as, for example, over matters of local finance, education, provisions for the poor, the establishment and maintenance of highways and bridges, and, in large measure, the administration of public justice.”

In *State ex rel. Summerfield v. Tyler*, 14 Wash. 495, the court declared that counties are *quasi*-municipal corporations, saying (p. 499):

“If what was said in this case was true as to a strictly municipal corporation like a city, it is much more true as to a *quasi* municipal corporation such as a county, for the reason that the latter is an involuntary corporation organized exclusively in the interests of the public and as an agency of the state, while the former may be held to be organized in some sense for the private benefit of its inhabitants.”

Again in *State ex rel. Board of Comr's. v. Clausen*, 95 Wash. 214, the court said (p. 222):

“Our constitution makes no special reference to county organizations as such other than to recognize them as legal subdivisions of the state, recognizing those counties existing at the time of the adoption of the constitution and providing for the organization of new counties by the legislature under certain restrictions. As local

subdivisions of the state, counties are created by the sovereign power of the state of its own sovereign will without any necessary particular solicitation, consent or concurrent action by the people who inhabit them. They are created by the state under its sovereign and paramount authority with a view to the policy of the state at large, for political organization, and the administration of governmental affairs. With scarcely an exception, all the powers and functions of county organizations have a direct and exclusive reference to the general policy of the state and are, in fact, but a branch of the general administration of that policy."

In *Rust v. Kitsap County*, 111 Wash. 170, the court said (p. 174):

"Counties are political subdivisions of the state and the state may delegate to, and empower counties with, such public functions as are inherently or properly local, and within such powers and duties prescribed, such functions should be deemed to deal with strictly county purposes, although exercised concurrently with the state."

B.

We now proceed to a consideration of the Acts of Congress and their intent:

The Revenue Act of October 3, 1917, is found in 40 U. S. Statutes at Large, p. 300. It was amended by the Act of February 24, 1919 (p. 1056).

The following statutory provisions are material:

§ 1 (p. 1057), defines terms as follows:

“The term ‘person’ includes partnerships and corporations, as well as individuals;

“The term ‘corporation’ includes associations, joint-stock companies, and insurance companies.”

§ 201 (p. 303) war excess profits tax, does not apply in case of United States, or any State or Territory or its officers or employees.

§ 500 (pp. 314 and 1101) imposes tax on transportation facilities.

§ 502 (p. 315) appearing in the 1919 Amendment as § 500, sub. (h), p. 1102, exempts for services rendered to the United States, or any State or Territory, or the District of Columbia.

§ 502 (p. 1103) provides that every *person* receiving payments under § 500, shall collect the tax and make monthly returns under *oath*, etc. The original act (§ 503, p. 315) said “each person, corporation, partnership or association, etc.”

§ 213 (p. 307) directs the Commissioner of Internal Revenue to make the necessary regulations to carry out the provisions of the act and to require any corporation, partnership or individual subject to the provisions of the act to furnish him such facts, data and information as in his judgment are necessary to collect the tax imposed. Regulations 49 were so issued.

§ 500, subdivision (h) (p. 1102), Regulations No. 49, same being Regulations Relating to the Col-

lection of Tax on Transportation and other Facilities, provides (p. 27 of Regulations) :

“No tax shall be imposed under this section upon any payment received for services rendered to the United States or to any State or Territory or the District of Columbia. The right to exemption under this subdivision shall be evidenced in such manner as the commissioner, with the approval of the Secretary, may by regulation prescribe.”

Article 68, Regulations No. 49, construing this subdivision, provides (p. 27) :

“The words ‘State’ and ‘Territory’ include political subdivisions thereof, such as counties, cities, towns, and other municipalities. The exemption, however, is to be secured only upon the production of such evidence of right to exemption as is called for by these regulations.”

There is then, in subdivision (h), § 500, and in Article 68 of the Regulations, an express provision that King County shall be exempt from the payment of this tax *for services rendered to King County*.

The term “carrier” is defined in Article 1, Regulations No. 49, as follows (p. 7) :

“The word ‘carrier,’ as used in Title V of the revenue act of 1918, is held to mean any person, corporation, partnership, or association who or which, for hire, furnishes any of the transportation services or facilities described or referred to in subdivisions (a), (b), (c), (d) and (e) of section 500 of the act.”

The term "person" is defined in Article 3, Regulations No. 49, as follows (p. 7):

"* * * The term 'person,' as used in the act and in these regulations, includes individuals, partnerships, corporations, and associations."

It is thus apparent that when King County pays for the transportation of persons or property by any carrier it is exempt by law from the payment of any tax. It is also clear that the words "carrier" and "person," as defined in the Regulations, is limited to individuals, persons, partnerships, corporations and associations and does not mention the "state or political subdivisions thereof."

The question then which confronts us is whether this Act of Congress imposes upon King County, as a political subdivision of the State, the burden of acting as an agent for the Federal Government in collecting this tax, and if the act so provides, whether Congress has the constitutional right to impose such burden.

The rule is well recognized that a federal statute will not be construed as placing any burdens upon the states or the political subdivisions thereof, unless the act itself is plain and express in its intent so to do.

In *United States v. Baltimore and Ohio Railroad Company*, 21 L. Ed. 597, an internal revenue tax was levied by Congress upon the interest on railroad bonds, the corporation being required to deduct the

tax. The City of Baltimore owned \$5,000,000.00 of these railroad bonds.

The court held,

1. That the act did not apply to the municipality, and
2. That Congress had no power to impose a tax burden on the municipality.

The court said (pp. 599, 600) :

“The creditor here is the City of Baltimore, and the question then arises whether this tax can be collected from the revenues of that municipal corporation.

“There is no dispute about the general rules of law applicable to this subject. The power of taxation by the Federal Government upon the subjects and in the manner prescribed by the Act we are considering, is undoubted. There are, however, certain departments which are excepted from the general power. The right of the States to administer their own affairs through their legislative, executive and judicial departments in their own manner through their own agencies, is conceded by the uniform decisions of this court and by the practice of the Federal Government from its organization. This carries with it an exemption of those agencies and instruments, from the taxing power of the Federal Government. If they may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed, if any inter-

ference is permitted. Hence, the beginning of such taxation is not allowed on the one side, is not claimed on the other.

“In the ‘Compendium of Internal Revenue Law,’ by Davidge & Kimball, it is said (p. 505, *Sayles v. Davis*, 22 Wis. 229), ‘Congress may not tax the revenues of a state;’ again: ‘A national bank cannot be called to account for a tax upon dividends due a State on stock owned by the State.’ P. 485, citing 12 Op. Atty. Gen., 402.

“Again: ‘The term ‘corporation’ as used in the Acts of Congress touching internal revenue does not include a State, consequently the income of the State of Georgia from the Western & Atlantic railroad, property owned, controlled, and managed by that State, has not been made by law a subject of taxation.’ *Georgia v. Atkins*, 6 Inter. Rev. Rec., 113.

“Again: ‘The term ‘persons,’ as used in secs. 9 and 44, does not include a State. The receipts or certificates issued by the State of Alabama are not subject to the tax of ten per cent. imposed by the Act of Congress of March 25th, 1867.’ 12 Op. Atty. Gen. 176.”

* * * * *

“A municipal corporation like the City of Baltimore, is a representative not only of the State, but is a portion of its governmental power. It is one of its creatures, made for a specific purpose, to exercise within a limited

sphere the powers of the State. The State may withdraw these local powers of Government at pleasure, and may, through its Legislature or other appointed channels, govern the local territory as it governs the State at large. It may enlarge or contract its powers or destroy its existence. As a portion of the State in the exercise of a limited portion of the powers of the State, its revenues, like those of the State, are not subject to taxation."

In *Georgia v. Atkins*, 10 Fed. Cases, 241, the State of Georgia owned a railroad, the net income of which formed a part of the revenue of the state.

The Collector of Internal Revenue demanded a revenue tax on the gross earnings of the railroad. The Court said (pp. 242, 243):

"One other question only need be the subject of examination, and that is whether, under the internal revenue laws, it was the intention of congress that a duty or tax should be collected out of the property owned, controlled, and managed solely by a state; for it is admitted in the pleadings that the Western and Atlantic Railroad is the property of the state of Georgia, exclusively, and that the net income arising from the road is revenue applied to the support of the government of the state. Section 103 of the act of Congress of June 30, 1864 (13 Stat. 275), as amended by that of March 3, 1865 (14 Stat. 135), declares 'that every person, firm, company, or corporation, owning or

possessing or having the care and management of any railroad, canal, steamboat, ship,' etc., 'engaged or employed in the business of transporting passengers or property for hire, or in transporting the mails of the United States, * * * shall be subject to and pay a duty of two and one-half per centum upon the gross receipts of such railroad, canal, steamboat, ship,' etc. The question, narrowed to a point, is this: Does the word or term 'corporation,' for the purposes of this act, and as herein used, include the term 'State?' "

* * * * *

"I am of the opinion that congress intended the term 'corporation,' as used in this act, to be understood in its general, obvious, and natural meaning; and, therefore, it does not include the term 'state.' And so far as my limited researches go, I am unable to discover a single case in the supreme court, or in any of the circuit or district courts of the United States, wherein it has been decided that the term 'corporation'—body corporate or politic—when used in a statute, includes a 'state,' or where the one term is used as a synonym for the other."

See also *Sherman Co. v. Simonds*, 27 L. Ed. 1093.

We respectfully submit that the Revenue Act discloses no intent to impose a burden by taxation or otherwise upon the state or its political subdivisions.

IV.

THE STATUTE CANNOT CONSTITUTIONALLY APPLY TO
THE OPERATION OF THESE FERRIES.

Passing the question of whether the act is broad enough in its terms to include the state or its subdivisions, it is submitted that congress is without power to impose this burden upon King County.

The rule is now almost too well settled even to require discussion that the state and its governmental agencies, which obviously includes counties, are exempt from federal taxation.

Collector v. Day, 78 U. S. (11 Wall.) 113;
20 L. Ed. 122;

U. S. v. Baltimore & Ohio Railroad Co., 17
Wall. 322; 21 L. Ed. 597;

Mercantile Bank v. New York, 121 U. S.
138; 30 L. Ed. 895;

Van Brocklin v. Tennessee, 117 U. S. 151;
29 L. Ed. 845;

Georgia v. Atkins, 1 Abbott 22; 10 Fed.
Cases No. 5350;

Pollock v. Farmers' Loan & Trust Co., 157
U. S. 429; 39 L. Ed. 759;

Evans v. Gore, 253 U. S. 245; 64 L. Ed.
887.

In the case of *Collector v. Day*, *supra*, a federal tax was sought to be imposed upon the salary of a state judicial officer. This was held to be beyond the powers of congress. The court after referring to the case of *Dobbins v. The Commissioners of Erie*, 16 Peters 435, in which it had been held that the

state could not tax the salary of a federal judge, held the converse of this to be true in the following language (p. 126):

“And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are, necessarily, and, for the sake of self-preservation, exempt from taxation by the states, why are not those of the states depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the states, nor is there any prohibiting the states from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is up-held by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?”

In the case of *U. S. v. B. & O. Ry. Co.*, *supra*, it was held that a municipal corporation within a state could not be taxed by the United States on the dividends or interest of stock or bonds held by it in

a railroad or canal company. The court in part said (p. 599):

“There is no dispute about the general rules of law applicable to this subject. The power of taxation by the Federal government upon the subjects and in the manner prescribed by the act we are considering is undoubted. There are, however, certain departments which are excepted from the general power. The right of the states to administer their own affairs through their legislative, executive and judicial departments, in their own manner, through their own agencies, is conceded by the uniform decisions of this court and by the practice of the Federal government from its organization. This carries with it an exemption of those agencies and instruments, from the taxing power of the Federal government. If they may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed, if any interference is permitted. Hence the beginning of such taxation is not allowed on the one side, is not claimed on the other.”

And in the income tax cases the entire subject was again re-examined by the court and the *B. & O.* case, *supra*, was again affirmed. We quote from that opinion (39 L. Ed. 820):

“The constitution contemplates the independent exercise by the nation and the state, severally, of their constitutional powers.

“As the States cannot tax the powers, the operations, or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a State.

“A municipal corporation is the representative of the state and one of the instrumentalities of the state government. It was long ago determined that the property and revenues of municipal corporations are not subjects of Federal taxation. *Buffington v. Day*, 78 U. S. 11 Wall. 115 (20: 122); *United States v. Baltimore & O. R. Co.*, 84 U. S. 17 Wall. 322, 332 (21: 597, 601). In *Buffington v. Day*, *supra*, it was adjudged that Congress had no power, even by an Act taxing all incomes, to levy a tax upon the salaries of judicial officers of a state, for reasons similar to those on which it had been held in *Dobbins v. Erie County Comrs.*, 41 U. S. 16 Pet. 435 (10: 1022), that a state could not tax the salaries of officers of the United States. *Mr. Justice Nelson*, in delivering judgment, said: (Follows quotation from *Collector v. Day* quoted above).

“This is quoted in *Van Brocklin v. Anderson*, 117 U. S. 151, 178 (29: 845, 854), and the opinion continues: ‘Applying the same principles, this court, in *United States v. Baltimore & O. R. Co.*, 84 U. S. 17 Wall. 322 (21: 597),

that a municipal corporation within a state could not be taxed by the United States on the dividends or interest of stock or bonds held by it in a railroad or canal company, because the municipal corporation was a representative of the state, created by the state to exercise a limited portion of its power of government, and therefore its revenues, like those of the state itself, were not taxable by the United States. The revenues thus adjudged to be exempt from Federal taxation were not themselves appropriated to any specific public use, nor derived from property held by the state or by the municipal corporation for any specific public use, but were part of the general income of that corporation, held for the public use in no other sense than all property and income, belonging to it in its municipal character, must be so held. The reasons for exempting all the property and income of a state or of a municipal corporation, which is a political division of the state, from Federal taxation, equally require the exemption of all the property and income of the national government from state taxation.' "

The soundness of these cases was again announced in *Evans v. Gore*, *supra*, where the court said (p. 893):

"True, the taxing power is comprehensive and acknowledges few exceptions. But that there are exceptions, besides the one we here

recognize and sustain, is well settled. In *Collector v. Day* (*Buffington v. Day*), 11 Wall. 113, 20 L. Ed. 122, it was held that Congress could not impose an income tax in respect of the salary of a judge of a state court; in *Pollock v. Farmers' Loan & T. Co.*, 157 U. S. 429, 585, 601, 652, 653, 39 L. Ed. 759, 820, 826, 844, 15 Sup. Ct. Rep. 673, it was held—the full court agreeing on this point—that Congress was without power to impose such a tax in respect of interest received from bonds issued by a state or any of its counties or municipalities; and in *United States v. Baltimore & Ohio R. Co.*, 17 Wall. 322, 21 L. Ed. 597, there was a like holding as to municipal revenues derived by the city of Baltimore from its ownership of stock in a railroad company. None of those decisions was put on any express prohibition in the Constitution, for there is none; but all recognized and gave effect to a prohibition implied from the independence of the states within their own spheres.”

The only qualification upon this rule is that announced in *South Carolina v. United States*, 199 U. S. 437; 50 L. Ed. 261. In that case the court held that an excise might be levied upon the sale of intoxicating liquor by agents of the state of South Carolina. This conclusion was by a divided court, and was premised upon the proposition that the exemption from taxation announced in the cases before referred to did not apply where the state

elected to engage in the performance of a purely private business. It was concluded that the business of selling intoxicating liquor was a private business and that consequently the exemption was not applicable.

While the tax here in question is imposed in the original instance upon the passenger, the effect of requiring the state to collect the tax at its own expense and of making it a guarantor of such collection, does not differ in effect than if a direct obligation or burden had been imposed upon the county itself. This is so for at least two reasons: (1) Because the tax cannot be collected except by the expenditure of county moneys, nor can the judgment of the court, if it should be against the defendant King County, be paid except by moneys raised by general taxation; and (2) because the collection of these fares is a means which the state has of raising revenue for the purpose of operating the ferry, and a burden imposed upon that power obviously interferes with the state in raising those revenues.

The case of *Ambrosini v. United States*, 187 U. S. 1; 47 L. Ed. 49, well illustrates this point. In that case it was held that bonds required to be given by the State of Illinois, and the City of Chicago, as a condition precedent to the issue of a liquor license, were exempt from the stamp tax requirement of the War Revenue Act of 1898, for the reason that the state, in requiring the giving of such a bond, was exercising a governmental func-

tion which could not be interfered with by the National government either by an imposition laid upon the state, or upon persons with whom the state might deal. The court in part said (p. 52):

“The granting of the licenses was the exercise of a strictly governmental function, and the giving of the bonds was part of the same transaction. To tax the license would be to impair the efficiency of state and municipal action on the subject and assumes the power to suppress such action.”

The case of *Ohio v. Thomas*, 173 U. S. 276; 43 L. Ed. 699, illustrates the same principle as applied to burdens imposed upon states by federal agencies. In that case it was held that a statute of Ohio regulating the use of oleomargarine could not be held applicable to the superintendent of a veterans' home. In the case the court observed (p. 701):

“Whatever jurisdiction the State may have over the place or ground where the institution is located, it can have none to interfere with the provision made by Congress for furnishing food to the inmates of the home, nor has it power to prohibit or regulate the furnishing of any article of food which is approved by the officers of the home, by the board of managers and by Congress. Under such circumstances the police power of the State has no application.”

So it may be held in the case at bar that Congress has no power to interfere with the provision made

by the statutes of Washington for the raising of funds to support this ferry by requiring the officers engaged in raising those funds to perform other duties for the benefit of the Federal government.

Likewise in *Johnson v. Maryland*, No. 2, U. S. Adv. Ops., p. 10, decided November 8, 1920, it was determined that a state might not require a Post-Office employe engaged in driving a government motor truck in the transportation of mail over a post road, to obtain an operator's license and pay a fee therefor. In concluding its opinion the court said (p. 11):

"It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer, upon examination, that they are competent for a necessary part of them, and pay a fee for permission to go on. Such a requirement does not merely touch the government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders, and requires qualifications in addition to those that the government has pronounced sufficient. It is the duty of the Department to employ persons competent for their work, and that duty it must be presumed has been performed. *Keim v. United States*, 177 U. S. 290, 293, 44 L. Ed. 774, 775, 20 Sup. Ct. Rep. 574."

We have already shown that the same limitations apply to the government that apply to the state. If a Post-Office employe may not be required to buy a license and show qualifications for driving a mail truck, then it seems equally clear that a state employe cannot be compelled to collect taxes for the Federal government as a condition precedent to the performance of the duties which the state has imposed upon him.

These cases illustrate quite clearly the fact that the theory of these tax cases is not restricted to a direct imposition laid upon the governmental activity of a sovereign state, but likewise applies to any imposition which will operate to prevent the state from exercising such a function. The case also serves to distinguish authorities such as *Merchants National Bank v. Pennsylvania*, 167 U. S. 461; 42 L. Ed. 236, and *National Bank v. Commonwealth*, 9 Wall. 353; 19 L. Ed. 701, cited upon this subject before the lower court by counsel for the government. Those cases hold that a state may lawfully require a national bank to collect taxes imposed upon shares of stock in such bank. The immunity of a national bank from state control is limited merely to those state measures which might interfere with the special federal purpose for which the bank was incorporated. In all other respects such a bank is subject to the laws of the state in the same manner as any other private corporation.

Obviously, the principle of these cases does not apply to agencies of the Federal government en-

gaged in the performance of a governmental function. To illustrate, the state could not impose upon the clerk of this court the duty, at the expense of the government, of collecting a poll tax upon suitors who appear in its courts, and make the government liable should the tax be not so collected, although the state could doubtless do this with a national bank. This distinction exists because the clerk is a special agent of the government and in administering the affairs of this court he is engaged upon a business which is entirely free from state control, either direct or indirect. By the same logic it is apparent that a municipal subdivision of the state, while engaged in a governmental function, cannot be compelled at its own expense and against its will, to act as a tax collector for the government. This must be so because of the lack of power of Congress over the governmental agencies of a sovereign state when engaged in the performance of governmental functions. It is likewise true that the government cannot impose a burden upon those means whereby the state secures revenue sufficient to enable it to perform those functions for which it was created.

The liability of the county and its officers, therefore, depends upon the question of whether the maintenance of this ferry is a strictly private business within the contemplation of the case of *South Carolina v. United States*, *supra*, or whether it is the exercise of a governmental function within the scope of the authorities first cited herein.

V.

IN THE PUBLIC OPERATION OF ITS FERRIES THE COUNTY IS ACTING IN A GOVERNMENTAL CAPACITY.

We submit that this is the uniform holding of the courts:

In *Hart v. Bridgeport*, 11 Fed. Cas. No. 6149, 13 Blatch. 289, the court distinguished these two functions of the government in the following apt language (p. 682):

“Public duties are, in general, those which are exercised by the state as a part of its sovereignty, for the benefit of the whole public. and the discharge of which is delegated or imposed by the state upon the municipal corporation. They are not exercised either by the state or the corporation for its own emolument or benefit, but for the benefit and protection of the entire population. Familiar examples of such governmental duties are the duty of preserving the peace, and the protection of property from wrongdoers, the construction of highways, the protection of health and the prevention of nuisances. The execution of these duties is undertaken by the government, because there is a universal obligation resting upon the government to protect all its citizens, and because the prevention of crime, the preservation of health, and the construction of means of inter-communication are benefits in which the whole community is alike and equally interested. Private or corporate

powers are those which the city is authorized to execute for its own emolument, and from which it derives special advantage, or for the increased comfort of its citizens, or for the well ordering and convenient regulation of particular classes of the business of its inhabitants, but are not exercised in the discharge of those general and recognized duties which are undertaken by the government for the universal benefit.”

The following excerpts show generally the nature of the business of operating a ferry as viewed at common law and by the various courts:

“It is quite clear, that a ferry is a franchise which none can set up without a license from the Crown, and in the case of a ferry by prescription a grant or license is presumed. As early as in the Year-Book, 22 Hen. 6, 146, it is thus laid down by Paston:

“ ‘If I have of ancient time a ferry in a town, and another sets up a ferry upon the same river near to my ferry, so that the profits of my ferry are impaired, I shall have against him an action on the case,’ and Newton says, ‘the case of a ferry differs from that of a mill, for you are bound to sustain the ferry, to serve and repair it, in ease of the common people, and it is inquirable before the sheriff in his town and Justices in Eyre.’ ”

Huzzey v. Field, 2 C. M. & R., 432.

“A ferry is a liberty, by prescription or the

King's grant, to have a boat for passage upon a great stream for carriage of horses and men for reasonable toll."

From *Termes de la Ley*, cited in *State v. Hudson County Freeholders*, 23 N. J. L. 206 (p. 209) :

"A ferry is a franchise which can only be set up by royal license or grant, for the ease of the King's subjects."

Piscary B, citing *Churchman v. Tunstal*, Hardres 163.

"The right to establish and keep a ferry is, in law, termed a franchise. In England franchises are understood to be royal privileges, in the hands of a subject. In this country they are deemed privileges conferred by government."

Benson v. New York, 10 Barb. 224.

"A ferry is a *publici juris*. It is a franchise that no one can erect without a license from the Crown."

Blissett v. Hart, Willes Rep. 512.

"It is a principle of the common law, that ferries are *publici juris* and can be granted by the sovereign power."

Mills v. St. Clair Co. Commrs., 4 Ill. 53.

"The right to establish ferries rests in the legislature."

Carroll v. Campbell, 108 Mo. 550;

Bush v. Peru Bridge Co., 3 Ind. 21.

Establishment of ferries within state's police power.

Fanning v. Gregoire, 57 U. S. (16 How.) 524; 14 L. Ed. 1043;

Conway v. Taylor, 66 U. S. (1 Black) 605; 17 L. Ed. 191.

“A ferry franchise is the creature of sovereign power, and no one can exercise it without the consent of the state.”

Murray v. Menefee, 20 Ark. 561.

“The right to establish ferries is an incident of sovereignty, and no individual has a right to establish one without the permission of the government.”

Stark v. McGowen, 1 Nott & McC. 307.

“It is a well settled principle of common law that no man may set up a ferry for all passengers without prescription time out of mind, or a charter from the King. He may make a ferry for his own use or the use of his family; but not for the common use of all the King’s subjects passing that way.”

Enfield Toll Bridge Co. v. Hartford & N. H. R. Co., 17 Conn. 40, 42 Am. Dec. 716, citing Hargraves Law Tracts, Chap. 2, p. 6, and *Hunter v. Moore*, 44 Ark. 184.

“It is the duty, then, of the sovereign authority to administer in all public affairs; and the establishment of roads, bridges and ferries, has ever been considered as a public affair. It is that in which the whole community is interested. ‘One of the principal things that ought to employ the attention of a government, with

respect to the welfare of the public in general, and of trade in particular, relates to highways, canals, etc., in which nothing ought to be neglected to render them safe and commodious.' The construction and preservation of all these works, being attended with great expense, the nation may very justly oblige all those to contribute to them who receive advantage from their use. Vattel 40."

Stark v. McGowen, supra.

In *McQuillin on Municipal Corporations*, Vol. 1, page 514, it is said:

"The use of streets is designed for the public at large as distinguished from the legal entity known as the city, or municipal corporation. The management of highways may be characterized as municipal duties relating to governmental affairs. During the early periods of English history the highways were laid out and constructed directly by the government. The government assumed the immediate and sole management of them, and this was recognized as an essential governmental function.

"In this country the control of highways is primarily a state duty. They are everywhere maintained for the use of the public at large."
(§ 227, p. 514.)

Further in the same work, Mr. McQuillin, at page 893, then continues:

"A ferry may be regarded as the continuation of a public highway from one side of the

water over which it passes to the other. In this sense it is a substitute for a bridge and its end and use is the same."

In *Chilvers v. People*, 11 Mich. 43, a ferry was defined as a public highway or thoroughfare across a stream of water or river by boat instead of by bridge.

In the case of *East Hartford v. Hartford Bridge Co.*, 10 Howard 511; 13 L. Ed. 518; a certain town owned and operated a ferry. The company, under legislative authority owned and operated a bridge, and it was contended that the legislature, by authorizing the operation of the bridge, had repealed the right of the town to operate the ferry. The town contended that it had a proprietary interest in the ferry which the legislature could not impair. The court, however, refused to accept this conclusion, saying (p. 528):

"The legislature was acting here on the one part, and public municipal and political corporations on the other. They were acting, too, in relation to a public object, being virtually a highway across the river, over another highway up and down the river. From this standing and relation of these parties, and from the subject matter of their action, we think that the doings of the legislature as to this ferry must be considered rather as public laws than as contracts. They related to public interests."

In *Simon v. Northup*, 30 L. R. A. 171, the Ore-

gon Supreme Court considered the general question in the following language:

“By the transfer to the county contemplated by this act, these bridges and ferries were to continue as public highways (p. 176).

* * * * *

“The law is now too well settled to be questioned that the public highways of a city are not the private property of the municipality, but are for the use of the general public, and that, as the legislature is the representative of the public at large, it has, in the absence of any constitutional restriction paramount authority over such ways, and may grant the use or supervision and control thereof to some other governmental agency so long as they are not diverted to some use substantially different from that for which they were originally intended. * * * A city occupies as it were, a dual relation to the state—the one governmental or political, and the other proprietary or private. In its governmental or political capacity it is nothing more than a mere governmental agent, subject to the absolute control of the legislature, except as restricted by the Constitution, and such property and easements as it may have in public streets and ways are held by it in such capacity, and at the will of the legislature (p. 177).

* * * * *

“It is competent for the legislature, in the

exercise of its plenary powers over public highways of the city of Portland, to transfer the management and control of the bridges and ferries in question from the commission appointed by it to the county, and to determine and provide the mode in which the burden of maintaining and keeping them in repair shall be borne in the future." (p. 177.)

The following cases illustrate the generally accepted theory that a ferry is merely a continuation of a highway.

"A public ferry being merely a part of the highway a county may establish such ferries in the absence of special statutory authority."

Reid v. Lincoln, 46 Mont. 31, 125 Pac. 429.

A ferry, in a general sense, is a highway over narrow waters, and is a continuation of the highway from one side of the water over which it passes to the other.

City of New York v. Starin, 106 N. Y. 1, 12 N. E. 631.

"As a link in the chain of transportation on dry land, a ferry forms a part of a public highway, or a connecting link between places in which the public has rights, * * *"

Hackett v. Wilson, 12 Ore. 25, 6 Pac. 652.

"A ferry * * * is but a substitute for a bridge where a bridge is impracticable
* * *"

People v. S. F. etc. Ry. Co., 35 Cal. 606-619.

"A boat is undoubtedly the easiest and most

simple way to span a stream which intersects a highway. Before the age of bridges it was the only way of crossing waters too deep to ford and too wide to swim. It became a matter of public concern, therefore, to have a boat stationed where it could be used when needed. Any person might supply this need through business enterprise for the reward which he might obtain through contracting to serve travelers. But this private enterprise was likely to prove wholly inadequate to satisfy the public needs. The boat owner would be inclined to drive hard bargains for his services, and there was nothing to require the boat to be in readiness at all times, whether to the convenience of the owner or not. It was therefore necessary for the public to have some supervision in the matter. The public good demanded that the boat should be at all times in readiness and that the charges should be reasonable and uniform. But to obtain these advantages it was necessary to secure the boatman from ruinous competition, and to make his income certain. The obvious way to accomplish this was to invest him with the royal prerogative, a franchise to take toll and to make the right to operate the ferry exclusive."

Note in 59 L. R. A. 513.

11 R. C. L. 914-915, citing

Patterson v. Wollmann, 5 N. D. 608; 67 N. W. 1040; 33 L. R. A. 536.

This is a leading case on the subject of ferries. It says (p. 537):

“It is settled law that the right to operate a ferry is not common to all citizens. It is a franchise emanating from the sovereign power. In the absence of a title based on prescription, no one can lawfully maintain a ferry without authority from the state.”

Speaking of constitutionality of exclusive franchises the court said (p. 538):

“A ferry is a moving public highway upon water. The highway upon land meets at either shore with a physical obstruction in the shape of a stream of water. How shall this highway be carried over this stream? The solution of this problem is exclusively within the province of the sovereign power. In this country such power is exercised by the state legislatures. It rests with such bodies, subject to such constitutional restrictions as relate to the matter to determine whether there shall be a bridge or an embankment of earth constructed or a ferry maintained to carry a highway over a stream.

* * * The state may exclude all persons from the business. It may run all the ferries itself.”

And finally we would direct the attention of the court to the language of Mr. Justice Field in the *Slaughter-House Cases*, 16 Wall. 36; 21 L. Ed. 394, where, in distinguishing legal and illegal monopolies, he observed (p. 412):

“It is also sought to justify the Act in ques-

tion on the same principle that exclusive grants for ferries, bridges and turnpikes are sanctioned, but it can find no support there. Those grants are of franchises of a public character appertaining to the government. Their use usually requires the exercise of the sovereign right of eminent domain. It is for the government to determine when one of them shall be granted and the conditions upon which it shall be enjoyed. It is the duty of the government to provide suitable roads, bridges and ferries for the convenience of the public. * * *"

If a ferry occupies the same category in the realm of municipal activities as does a bridge or a highway, as the authorities all seem to hold, then no one, we apprehend, could with logic contend that the operation of such a ferry is not a governmental function. In legal theory such operation differs in no way from the construction of a highway or bridge. It certainly will not be contended that the Federal government should impose an excise tax upon a state as a condition precedent to the exercise of the privilege of constructing a public highway or bridge for the use of its citizens. This must be so because since the power to tax includes the power to destroy, then the building of highways could be prevented by the exercise of the taxing power of the National government. The judicial knowledge of this court is ample to inform it that no civilized community can now function without highways. They are necessary in times of disorder to enable

officers of the law to protect the sovereignty of the state. They are likewise necessary so that citizens may exercise their right of franchise. The construction of the highway then, is essentially governmental, and a ferry being but a floating highway upon the water is of the same character, and neither is it necessary under the *Ambrosini* case, *supra*, that the burden in question be a direct tax levied upon the state or its subdivisions.

Under the provisions of the Washington Statute (Session Laws of 1895, p. 341, Session Laws of 1919, p. 282), ferries may be maintained either free or by toll. The question of whether or not the expense of performing the function shall be imposed by means of general taxation, or by the collection of moneys from persons especially benefited, obviously does not affect the immunity which the thing to be performed has from federal burdens. If this be so, then it must be conceded that the federal government has no power to impose a tax upon the action of patrons in making contributions to the state for the exercise of this function. The government, we apprehend, would not contend that the United States could collect from all contributors to the general road and bridge fund of King County a tax of three per cent of the moneys contributed. Certainly this could not be the case because if a tax of three per cent could be exacted then likewise one hundred per cent, or even an arbitrary sum of money could be required. The result then would be that by federal excise the state could be pre-

vented from raising those revenues which are essential to the performance of the things for which the state is created. There can be no difference between such a situation and the one presented here. If the government may not impose an excise upon the tax collecting power of the state, then neither can it impose an excise upon revenues collected by other means. The question in all cases must be tested by its effect upon the state. If that effect is to hamper or interfere with the state in the exercise of a governmental function then it is illegal.

There is no analogy between this case and the case of *South Carolina v. United States*, *supra*. The business of selling intoxicating liquor is obviously of a private character. There is not the slightest resemblance between the construction and maintenance of a water highway and the business of a rum seller.

In any event, whatever may be said of the *South Carolina* case, it refers with express approval to the case of *United States v. B. & O. Ry. Co.*, 17 Wall. 322. Likewise, the same court in the subsequent case of *Evans v. Gore*, 253 U. S. 245, also approved that case. The *B. & O. Ry. Co.* case, *supra*, held that a federal tax could not be imposed upon revenues received by a municipal corporation of Maryland from funds invested in a private railroad corporation because the investment of municipal funds in a railroad was for the general benefit of the citizens of the municipality and the city, in making such investment, acted in its governmental

capacity. If the investment of municipal funds in a private corporation operated to carry articles of commerce, be beyond the taxing power of the government, then there can be no escape from the conclusion that the direct maintenance of an agency of the same character is likewise free from possible Federal burdens.

Based upon the foregoing principles of law, we respectfully submit:

1. That a judgment based upon the complaint herein would impose a direct and substantial burden by the United States upon a political subdivision and instrumentality of the State of Washington without the consent of the State of Washington, and contrary to the provisions of the 10th Amendment, the 9th Amendment, the 5th Amendment, the first clause of Sec. 8 of Art. I, the 4th clause of Sec. 9, of Art. I and Sec. 4 of Art. IV, all of the Constitution of the United States.

2. That the attempted imposition by the United States or any officer, agent or employe thereof, upon defendants in error Claude C. Ramsay, Lou C. Smith, and Thomas Dobson, individually, of the alleged duty of collecting, accounting for and remitting to plaintiff in error or its authorized representatives of any tax under the Act of Congress of October 3, 1917, as amended by the Act of Congress of February 24, 1919, or of being liable to plaintiff in error in any sum whatsoever for failure, neglect or refusal so to do, as alleged in said bill of complaint, would deprive such defendants in error and

each of them of their property without due process of law, contrary to the provisions of the 5th Amendment to the Constitution of the United States.

3. That the attempted imposition by the United States, or any officer, agent or employe thereof, upon defendants in error Claude C. Ramsay, Lou C. Smith and Thomas Dobson, as County Commissioners of defendant in error King County, of the alleged duty of collecting, accounting for and remitting to plaintiff in error or its authorized representatives any tax under the Act of Congress of October 3, 1917, as amended by the Act of Congress of February 24, 1919, or of being liable to plaintiff in error in any sum whatsoever for failure, neglect, or refusal so to do, as alleged in said bill of complaint, would deprive such defendants in error and each of them of their property without due process of law, contrary to the provisions of the 5th Amendment to the Constitution of the United States, and would constitute a tax upon the salaries of such defendant in error public officers of said King County without the consent of the State of Washington and contrary to the provisions of the 10th Amendment to the Constitution of the United States.

4. That said Acts of Congress and the Regulations promulgated thereunder by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury do not impose upon defendant in error King County, or any officer, agent or employe thereof, any duty to collect, account for or remit to the United States or the authorized repre-

sentative thereof, any taxes specified in Sec. 500 of said Acts, and that any provision of said Acts of Congress or said Regulations attempting to impose or direct the imposition of any such duty is contrary to the provisions of the 10th Amendment, the 9th Amendment, the 5th Amendment, the first clause of Sec. 8 of Art. I, the 4th clause of Sec. 9 of Art. I, and Sec. 4 of Art. IV, all of the Constitution of the United States.

5. That insofar as said Acts of Congress or either of them shall be held and construed to impose any duty and obligation upon defendant in error King County to collect, account for or remit to the United States or the authorized representative thereof any such taxes, the said Acts of Congress and Regulations and each of them are unconstitutional and void as an attempt to tax or burden an agency or instrumentality of the State Government without the consent of the State of Washington, and contrary to provisions of the 10th Amendment to the Constitution of the United States.

CONCLUSION.

We respectfully submit:

1. That the Revenue Act of 1918 does not apply to the State or its political subdivisions.
2. That if it does so apply, the burden which

the Collector of Internal Revenue seeks to impose on King County can only be met from general taxes.

3. That in the public ownership and operation of its ferry system, King County is acting in public or governmental capacity.

4. That Congress is without power, under the Federal Constitution, to enact legislation imposing upon King County the burden of acting as its agent for the collection of revenue taxes or compelling the County to pay to the Collector any such taxes which it has heretofore or may hereafter fail to collect.

5. That Congress is without power to impose a tax upon contributions made by citizens of King County for the support of the county government.

The judgment should be affirmed.

Respectfully submitted,

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Attorneys for Defendants in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

ASMA RUBAIZ,

Appellant,

vs.

THE TUCSON GAS, ELECTRIC LIGHT &
POWER COMPANY, a Corporation, TUC-
SON RAPID TRANSIT COMPANY, a
Corporation, THE INTERNATIONAL
TRUST COMPANY, a Corporation, and
EDWIN F. JONES, as Receiver,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the
District of Arizona.

FILED
DEC 10 1921.
F. D. MONCKTON,
CLERK

United States
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Solicitors for Appellees.

EDWIN F. JONES, Receiver, Tucson, Arizona.

In the District Court of the United States, in and
for the District of Arizona.

IN EQUITY—No. 70—TUCSON.

(Tucson)

THE TUCSON GAS, ELECTRIC LIGHT AND
POWER COMPANY, a Corporation,

Plaintiff,

vs.

THE TUSCON RAPID TRANSIT COMPANY, a
Corporation,

Defendant.

Complaint.

Comes now the plaintiff, The Tucson, Gas, Electric
Light and Power Company, and respectfully shows:

I.

That it is now and at all times hereinafter men-
tioned was a corporation organized and existing un-
der and by virtue of the laws of the State of Colo-

rado, and is now and at all times hereinafter mentioned was a citizen and resident of said state; that the defendant, The Tucson Rapid Transit Company, is now and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the Territory now State of Arizona, and that it is now and at all times hereinafter mentioned was a resident and citizen of the said State of Arizona.

II.

That the said defendant is the owner of and is operating a system of street railway in the City of Tucson, Pima County, Arizona, and has been operating and conducting said railway ever since 1906 to the present time, and is the owner of the said railway including the right of way, rails, rolling stock, certain real estate, franchises, and all property used in the operation of said street railway; and that said defendant is a common carrier.

III.

That the said defendant is indebted to the plaintiff in the sum of Sixty-two Thousand Sixty-two Dollars and Forty-three Cents (\$62,062.43) for moneys loaned and advanced by the plaintiff to said defendant, and that said indebtedness is evidenced by certain promissory notes executed by the defendant unto the plaintiff as follows: A demand note dated February 10, 1915, in the sum of [1*]

*Page-number appearing at foot of page of original certified Transcript of Record.

Twenty-five Thousand (\$25,000.00) Dollars; which has been renewed, payable on demand; a demand note dated March 20, 1916, in the sum of Fifteen Thousand (\$15,000.00) Dollars; a demand note dated November 30, 1917, in the sum of Twenty Thousand (\$20,000.00) Dollars. That there is due accrued interest upon said notes in upwards the sum of Two Thousand (\$2,000.00) Dollars. That plaintiff has demanded payment of said notes and of each of them with the interest, and that said payment has been refused, and that each and all of said notes, together with said interest, are now due owing and unpaid from the defendant to the plaintiff.

IV.

That on the 15th day of March, 1906, the said defendant executed a certain deed of trust to The International Trust Company, a corporation organized and existing under the laws of the State of Colorado and having its principal place of business in the city of Denver in said state, and did mortgage to said Trustee at said time all of its property, real, personal and mixed, that it then had or might thereafter acquire or become possessed of; that said deed of trust was executed to secure the payment of certain bonds about to be issued by defendant in the aggregate principal sum of Three Hundred Thousand (\$300,000.00) Dollars, together with interest thereon at the rate of six per cent (6%) per annum, payable semi-annually, and evi-

denced by coupons to be attached to said bonds, and that said bonds were payable twenty-two (22) years from their said date, to wit, the 15th day of March (2), 1906; that it was provided in said deed of trust that bonds thereunder in the aggregate amount of One Hundred and Fifty Thousand Dollars (\$150,000.00) should be at once issued and certified and that the remainder of said bonds, to wit, One Hundred and Fifty Thousand (\$150,000.00) Dollars, should be issued and certified only after expenditures for new construction or new equipment, all as provided in said deed of trust; that said instrument was executed on or about the date aforesaid, to wit, the 15th day of March, 1906, and filed and recorded in the office of the County Recorder of the said County of Pima; that under said deed of trust and out of the One Hundred and Fifty Thousand (\$150,000.00) Dollars of bonds therein [2] provided to be issued forthwith there were issued and disposed of by the said defendant company bonds aggregating the total amount of One Hundred and Fourteen Thousand Eight Hundred (\$114,800.00) Dollars, and that as plaintiff is advised and believes, and upon such information avers, no other or further bonds than the said last-mentioned amount were issued or certified under said deed of trust; that the whole of said amount of One Hundred and Fourteen Thousand Eight Hundred (\$14,800.00) Dollars par value of said bonds are now outstanding and have not been paid in whole

or in part; that since the year 1910 the defendant has not paid any interest upon said bonds and that the whole of said interest from and after the year 1910 up to the present time is now unpaid and is due and owing unto the holders of said bonds, and that said interest now accrued and unpaid amounts to upwards the sum of Seventy-three Thousand (\$73,000.00) Dollars; that demand for the payment of said interest has been made, as plaintiff is advised and believes and so avers, and that said demand has been refused, and that the whole of said interest, as aforesaid, is now due, owing and unpaid by the defendant to the holders and owners of said bonds.

V.

That for many years last past the said defendant company (3) in the operation of the said street railway line has not been able to earn its interest and operating charges and that said defendant is now insolvent.

VI.

That in the month of January, 1918, an action was brought against said defendant company by one Asma Rubiaz for alleged personal injuries occasioned to her by the alleged negligence of the servants and employees of the defendant company, and that in the month of June, 1918, a judgment was obtained by said plaintiff in said action against the said defendant in the sum of approximately Four Thousand Five Hundred (\$4,500.00) Dollars,

and that the whole of said judgment now remains unpaid.

VII.

That if the said creditors of the said defendant or the owner of said judgment in said personal injury action should press [3] their said demands it might and would result in consequences disastrous to the public in the operation of said street railway by possible sale and dismemberment of the said railway system and which might and possibly would prevent the operation of said street railway and might result in sales of portions of the property and equipment of said company to different individuals or corporations by which it would be impossible to continue the carrying of passengers as heretofore, and the sale of the said property of the said defendant would probably be for a sum below its value, and thus the security for all of the creditors for the ultimate payment of their claims would be impaired. That the said defendant is, as above stated, insolvent and unable to pay the various obligations of indebtedness or claims of indebtedness heretofore mentioned and set forth.

WHEREFORE, plaintiff prays: (4)

1. That plaintiff have judgment against the defendant in the sum of Sixty Thousand (\$60,000.00) Dollars, together with interest thereon on Twenty-five Thousand (\$25,000.00) Dollars from February 10, 1915, and on Fifteen Thousand (\$15,000.00) Dollars

from March 20, 1916, and on Twenty Thousand (\$20,000.00) Dollars from November 30, 1917, at the rate of eight per cent (8%) per annum.

2. That this Honorable Court take the said property of the said defendant company into its possession and that the creditors of the defendant, or any and all persons having claims or demands against said defendant, be required to present the same and that said claims be ascertained and determined, and that the Court fully administer the fund obtained and the assets of the said defendant company and that the said assets be marshaled and the respective lien or liens and priorities existing therein be ascertained and that the Court enforce and decree the rights, liens and equities of all creditors or persons having claims upon or against the defendant as the same may be finally ascertained by the Court; and that for the purpose of preserving the property of the said defendant a receiver be appointed with power to collect all of the assets of the defendant company and that authority to run and operate said street railway system and to collect [4] and receive all moneys due and apply the income thereof under the direction of the Court and for such period as the Court may order, and that for the purpose of protecting and preserving the property of the said defendant company from being sacrificed under proceedings liable to be taken and which might prejudice the same, and that temporarily and pending the suit an injunction might

issue against the defendant and all persons claiming to act by, through, or under it, and all other persons, restraining them and each and all of them from interfering with the Receiver taking possession of and operating the property. And that plaintiff have such (5) other and further relief as to the Court may seem just and proper, together with its costs in this behalf expended.

KINGAN & CAMPBELL,

Attorneys for Plaintiff.

State of Arizona,

County of Pima,—ss.

Frank E. Russell, being first duly sworn, on his oath says: That he is the general manager of the plaintiff corporation and makes this affidavit on its behalf; that he has read the foregoing complaint and knows the contents thereof, and that the same is true in substance and in fact, except as to those matters stated on information and belief, and as to them that he believes it to be true.

FRANK E. RUSSELL.

Subscribed and sworn to before me this 20th day of February, 1919.

[Seal]

G. H. LANGWORTHY,

Notary Public.

My commission expires Nov. 19, 1921. (6)

[Endorsed]: No. E-70 (Tucson). In the District Court of the United States, in and for the District of Arizona. The Tucson Gas, Electric

Light & Power Company, a Corporation, Plaintiff,
vs. The Tucson Rapid Transit Company, a Corpora-
tion, Defendant. Filed Feb. 20, 1919. Mose Drach-
man, Clerk. By Effie D. Botts, Chief Deputy
Clerk. [5]

In the District Court of the United States, in and
for the District of Arizona.

IN EQUITY—No. 70—TUCSON.

(Tucson.)

THE TUCSON GAS, ELECTRIC LIGHT AND
POWER COMPANY, a Corporation,
Plaintiff,

vs.

THE TUCSON RAPID TRANSIT COMPANY,
a Corporation,
Defendant.

Answer.

The Tucson Rapid Transit Company, a corpora-
tion, the defendant in this action, for answer to the
bill of complaint herein, answering says:

I.

The defendant admits all the allegations of said
bill of complaint.

II.

The defendant reiterating the admission of the
preceding article of this answer, joins in the prayer
of said bill of complaint, and prays that this Court,

sitting in equity, may take possession of the property of the defendant through the appointment of a receiver, as prayed for in said bill of complaint, and thereby preserve the unity of the property of the defendant as it has been maintained and operated, and protect and preserve the corporate franchises, privileges and property, and preserve the corporate existence of the defendant, and protect and preserve its said property, real, personal and mixed, from (1) being sacrificed under any proceedings which can or may be taken liable to prejudice or sacrifice the same, and to do any and all acts which may be necessary to preserve the valuable rights and franchises of the defendant, and it accordingly prays that inasmuch as there is no adequate remedy at law in the premises for the complainant or for the defendant, that this Court will, for the purposes aforesaid, appoint a receiver, as prayed for in said bill of complaint, and empower and authorize such receiver to take possession of the entire property of this defendant, and to preserve, manage, operate and control the same, and as far [6] as possible pay all indebtedness due or to become due by this defendant, and otherwise discharge all the duties ordinarily imposed by Courts upon receivers in similar cases.

That on the final hearing in this cause, this Court will under said bill of complaint and this answer, or such supplemental bill as shall be filed herein, make such decree or decrees with respect to the

property of this defendant as shall deal with the same on general equitable principles, and that this Court will cause all the liens upon said property, or any part thereof, and all rights and claims in equity of persons interested therein, to be ascertained, defined and determined, and that the proceeds arising from the operation and sale, if any is ordered, of said property, or any part thereof be applied under the said orders or decrees of this Court according to the rights, interests and equities of the parties interested therein, and that the Court will direct all persons in possession of property of this defendant, or any part thereof, to surrender the same to such receiver, or to hold such property under such receiver.

GEORGE O. HILZINGER,
Solicitor for Defendant. (2)

[Endorsed]: In Equity—No. E-70 (Tucson). In the District Court of the United States, in and for the District of Arizona. The Tucson Gas, Electric Light and Power Company, a Corporation, Plaintiff, vs. The Tucson Rapid Transit Company, a Corporation, Defendant. Answer. Filed Feb. 20, 1919. Mose Drachman, Clerk. By Effie D. Botts, Chief Deputy Clerk. Geo. O. Hilzinger, Solicitor for Defendant. [7]

In the District Court of the United States, in and
for the District of Arizona.

THE TUCSON GAS, ELECTRIC LIGHT &
POWER COMPANY, a Corporation,
Plaintiff,

vs.

THE TUCSON RAPID TRANSIT COMPANY,
a Corporation,
Defendant.

Order Appointing Receiver.

And now this cause coming on to be heard, upon the application of the plaintiff for the appointment of a Receiver, plaintiff appearing by Kingan & Campbell, its attorneys, and the defendant, the Tucson Rapid Transit Company, appearing by its attorney, ———, and all parties consenting thereto,—

IT IS ORDERED AND ADJUDGED, That Edwin F. Jones, be and he is hereby appointed Receiver of all of the property and assets of every kind and description of the said defendant, the Tucson Rapid Transit Company, with full authority to take possession thereof, and receive, operate, manage and control the same. Said Receiver is hereby empowered and instructed to take possession of all of the said property of the Tucson Rapid Transit Company, and to manage, control and operate the street railway of said defendant company,

and to take in his possession as aforesaid all property of said company, of every kind and character, and to preserve and protect all of said property, and to collect as far as possible all assets choses in action and credits due to said company, acting in all things under the orders of this Court. The said Receiver shall also have authority subject to the supervision of the Court, to make such repairs to said railway and property as are necessary in his judgment for the carrying on of the business thereof, and also to make all contracts that may be necessary in carrying on the business of said railroad, subject to the supervision of this Court; (1)

IT IS FURTHER ORDERED, That the said Receiver, out of the money which shall come into his hands by the operation of said railroad or otherwise proceed to make payments as follows: He will pay all current expenses incident to the operation of said railroad and the administration of his trust; he shall pay all amounts now legally [8] due or that shall hereafter become due for taxes on any of the property over which he is appointed Receiver, and any other or further funds which may come into his hands he shall hold subject to the supervision of this Court;

IT IS FURTHER ORDERED, That any and all persons in possession of the property of the said defendant or any part thereof shall at once surrender the same to such Receiver or shall hold said property under such Receiver; and that said de-

fendant *are* hereby restrained and enjoined from interfering with said Receiver, in the possession and operation of said property.

IT IS FURTHER ORDERED, That the said Edwin F. Jones give bond in the penal sum of Ten Thousand and no/100 Dollars (\$10,000.00) with sureties to be approved by the clerk of this court, conditioned for the faithful performance of his duties as such Receiver.

Dated, this 21st day of February, 1919.

WM. H. SAWTELLE,

Judge. (2)

[Endorsed]: In the District Court of the United States in and for the District of Arizona. The Tucson Gas, Electric Light & Power Company, a Corporation, Plaintiff, vs. Tucson Rapid Transit Company, a Corporation, Defendant. Order Appointing Receiver. Filed February 21, 1919. Mose Drachman, Clerk. By Effie D. Botts, Chief Deputy Clerk. [9]

In the District Court of the United States for the
District of Arizona.

THE TUCSON GAS, ELECTRIC LIGHT AND
POWER COMPANY, a Corporation,
Plaintiff,

vs.

THE TUCSON RAPID TRANSIT COMPANY,
a Corporation,
Defendant.

Report of Receiver.

To the Honorable WILLIAM H. SAWTELLE,
Judge:

The undersigned heretofore appointed by order of the Court as Receiver of the property and assets of the defendant, The Tucson Rapid Transit Company, respectfully reports.

That immediately upon being appointed he qualified and took possession of the property of the Company.

There is outstanding *capitol* stock, all common of.....\$500,000

There are also first mortgage bonds dated 3, 15, 16 (March 15, 1916), to the amount of..... 114,000

There are demand notes due the Tucson Gas Electric Light and Power Company..... 60,000

Making a total of *Capitol* Account liabilities.....\$674,000

There are open accounts due by the Company as follows:

Federal Light and Traction Company...\$ 1,252.48

Unpaid interest on bonds..... 77,289.00

Unpaid interest on notes, Tucson Gas,
Electric Light and Power Company. 1,199.99

Accounts payable.....	588.68
Open account.....	4,980.28

Making a total of current liabilities....\$ 85,310.43

There is also a tax liability which will

have to be met in May of.....\$ 1,212.28

And other unadjusted claims against

the Company..... 1,964.13

Making a total liability of.....\$764,938.74

To this must be added the judgment and costs in the case of *Asma Rubais vs. Tucson Rapid Transit Company*, which is now pending on appeal in the Supreme Court of the State.

The property consists of about 4.35 miles of single track lying within the corporate limits of the city of Tucson, and may roughly said to be divided into two lines.

1. The line from the corner of Congress Street and Stone Avenue to the University of Arizona.

2. The lines on the south side of the Southern Pacific Railroad, consisting of the line down Congress Street and the Fourth [10] (2) Avenue line running south from the Subway to 17th Street and rejoining the Congress Street line at the foot of Main Street, and the line south on Stone Avenue to 17th Street.

The first line from the intersection of Stone Avenue and Congress Street is paved to the crossing of the Southern Pacific Railroad Company and this

part of the line is comparatively permanent, in good repair and will require but small maintenance expense. North of the Southern Pacific Crossing on Stone Avenue and Third Street the line is in a dirt street which will always require constant care and repair, it being impossible in the nature of things to escape a constant charge for maintainance on this part of the line.

Of the track on the south side of the Southern Pacific, other than the University line, that on Stone Avenue South of Congress is paved and repairs will be small on that line; also the track on Congress Street is paved and maintenance charges will be small. The rest of the track consisting of the lines on Fourth Avenue, Seventeenth Street and Main Street are in dirt streets and will require considerable maintenance expense.

The company is confronted by the fact that the business district lies wholly on the southern side of the Southern Pacific Railroad, while the much larger part of the residence district, from which the travel must be had, lies on the northern side. There is but one crossing of the Southern Pacific by the company, that on Stone Avenue where the line crosses five tracks of the Southern Pacific Company. The crossing is both destructive of the ability of the company to maintain its schedule on the University line, caused by the inevitable delay occasioned by the passage across it at slow speed of the numerour freight trains on the line, it being

situated near the foot of a long grade entering the town from the west, and requiring the help of another engine to take trains to the yards, and we having crossed the railroad line, are bound to maintain the crossings, as well as keep a man there seventeen hours a day to attend to the safety switches. The total cost of maintenance and the pay of (3) the watheman there exhaust a sum equal to fair [11] interest on \$30,000.00. Again, this being the only crossing, it has resulted in a situation which has been judged by the owners to forbid any extension into the territory lying between the railroad on the south and Third Streer or University Avenue, as it is sometimes called, on the north, and extending from Stone Avenue on the west to the property of the University on the east. In this area most of the home building done in Tucson for the last three years has been done, and I think it is within limits to say that sixty-five per cent of the building of the moderate priced dwellings, (\$2,500.00 to \$5,000.00) has been done there. It is inhabited by a self-sustaining population in moderate circumstances and certainly furnishes the most promising territory for an increase of business of the company. If a loop could be run from the present terminus at the University south for four or five blocks and then secure a crossing of the Southern Pacific at or near the Subway it would be an ideal extension, and would, in the opinion of the writer, double if it did not treble the income of

that part of the line. And if this crossing could be secured either over or under the track of the railroad and thus avoid the delay, danger and expense of a grade crossing the system would soon be on its legs financially and the community would secure what it has never had, prompt, safe and pleasant means of travel between the residence and business portions of the city. This extension would also do what the system now fails to do, in that it would furnish transportation to the High School which draws its pupils from all parts of the city, and should furnish a steady source of business. If the objections to the use of the subway as a means of crossing the railroad will prevent its use for that purpose, and it be considered impracticable to secure a crossing at or near that point, by other means, then it is suggested that an extension of the line from the present terminus at the University south for four blocks and thence a line running west along Sixth Street and by the High School to a junction with the present Stone Avenue line on either Fifty or Sixth Streets, would at least double the receipts of the line. This solution of the problem of meeting the transportation needs of the people between the residence and business portions of the town, would still leave [12] such travel subject to the delays and dangers of the grade crossing at Stone Avenue and would still leave the company unable to maintain its schedule and subject to the

(4) expensive maintenance of the crossing. The writer believes that it would pay the company if some arrangement could be made by which the company and the railroad should be enabled to dispense with this obstacle in the way of a successful system and the city could afford, as it did in the case of the present subway, to contribute a material part of the expense of securing this much needed crossing. The results which followed the opening of the present subway in all the district affected by it amply shows the good judgement which dictated its construction, and is alike instructive and encouraging.

The rolling-stock of the company is antiquated in part, some of the cars having been in service when the writer came to Tucson in February, 1906, and the later additions in the shape of the one-man cars added a year or two ago being unsatisfactory and uncomfortable. It has been maintained as well as the revenues of the company would permit and has still a very substantial value.

The 9 cars owned by the company are

carried on its books at a value of . . . \$23,877.01

and the electric equipment of the cars

at 883.20

Some year or more ago the company, vexed by the competition between the University and the business portion of the town attempted to solve the

problem by the purchase of the busses used, and made an investment in them of.....	3,5000.00
--	-----------

Thus making a total investment in roll- ing stock of.....	\$28,160.21
--	-------------

The operation of the busses *were* a failure and they are practically worthless for any company purpose.

The company employs regularly 14 men and three others have been temporarily employed. The men have been careful in the operation of the system and no complaint has come to the attention of the Receiver as to the conduct or bearing of any employee of the company.

The operation of the company for the month of March show scarcely any margin between the income and the expenses of the company, and unfortunately in the opinion of the Receiver there is [13] small hope of any substantial increase in receipts with the present mileage, and absolutely no hope of any substantial decrease in the expenses (5).

For the month of March there has been a

gross income of.....	\$2,735.71
----------------------	------------

As against the income for the same month

last year of.....	25,518.88
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Showing an increase of.....	\$ 216.83
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The operating expenses for March, 1919,	
are.....	\$ 2,688.29
For March, 1918, they were.....	2,116.29

Showing an increase of.....\$ 572.00

The following history of the condition of the company for the last year is perhaps pertinent to the consideration of these figures.

Some time ago the company secured from the Corporation Commission of the State of Arizona the right to raise the fares from a straight five cent fare to eight cents for a single fare and some small reduction of that rate where more than a single ticket was purchased and the effects of this order are beginning to be felt and its probable result on the earnings of the company can soon be determined with a fair degree of accuracy.

It has manifestly caused a small increase in the passenger revenue of the company, but this is at the expense of the number of passengers carried, the company having carried 13,319 less passengers in the month of March this year and the corresponding period last year. It still remains to be seen whether the public will ride at the eight cent fare.

The increase in the operating expenses was caused by the increased wages paid the employees and in view of present conditions.

The capital of the company seems excessive, and it is certain that its physical replacement could be had for a much less sum, but it is also indisputable

that the system has been a losing venture under the circumstances surrounding it, and that the persons who have put their money into it have not received a fair return. It is unquestionably true that financing the construction of street-car lines in cities the size of Tucson, is largely a work of faith, and that generally the estimates of future earning of the company and the growth of the population to be served are painted in the rosey colors of hope, rather than in the soberer [14] tones of the things that really happen. Certain it is that the prospects which ten years ago seemed to lie in the path of the company and the city had many setbacks and hinderances for which the company was in no wise responsible. The panic of 1907 and 1908, and the long-continued disturba in Mexico which very injuriously affected the growth of the (6) city had a like effect on the revenues of the company, and the fact that its income has not sufficed to pay the interest on its bonds to say nothing of any dividends to its stockholders is eloquent of the difficulties it has met.

While these things are true, it is likewise true that the citizens of Tucson are entitled to a reasonably efficient service, and it must be true that the owners of the system must furnish such reasonably adequate facilities as demanded by the conditions now existing and must therefore make such further extensions as the situation warrants viewed in the light of things as they now exist. It may not be

called on to make extensions or improvements which would not at the present time yield a fair revenue, but surely where the field shows the business needs of extensions, with fair revenue, the company should, if possible, make them, and the public have the right to insist that this be done.

While it is clearly true that a court will not compel a private business to incur further expense or to take further risks by the extension of its operations, but will simply hold its assets for the benefit of the persons found entitled to them, it may well be argued that where a public franchise is involved, and the corporation owes *quasi*-public duties, or uses public streets or other property under its franchise that in a proper case the right of the public to service might be paramount to private profit and a court would compel a reasonable exercise of the franchise whether presently profitable or not.

The company has no power plant of its own, but purchases its power from the Tucson Gas, Electric Light and Power Company at rates fixed by the corporation Commission of the State of Arizona. The fair cost of power is such a complex thing, and the writer not having the data to determine whether the rate allowed by the Commission is fair under the existing circumstances does not feel [15] warranted at this time in saying that the cost is excessive, but the matter is receiving his careful attention, and if the facts warrant such action the

matter will be brought to the attention of the Court.

Respectfully submitted,

EDWIN F. JONES,

Receiver.

[Endorsed]: In the District Court of the United States for the District of Arizona. The Tucson Gas, Electric Light and Power Co., a Corporation, Plaintiff, vs. The Tucson Rapid Transit Company, a Corporation, Defendant. Report of Receiver. Filed April 26, 1919. Mose Drachman, Clerk. By Effie D. Botts, Chief Deputy Clerk. [16]

In the District Court of the United States for the
District of Arizona.

TUCSON GAS, ELECTRIC LIGHT AND
POWER COMPANY,

Plaintiff,

vs.

TUCSON RAPID TRANSIT COMPANY,

Defendants.

Report of Receiver.

To the Honorable WILLIAM H. SAWTELLE.

The undersigned herewith files his second report as Receiver in the above-entitled cause, showing operations of the property of the defendant corporation up to June 1st, 1919.

The business has materially increased during the

month of May, the total receipts being \$3,211.99 against \$2,467.68 for May, 1918, an increase of 30.2%. The business for the five months (January 1st to June 1st), 1919, amounts to \$13,727.85, while for a similar period in 1918 the receipts amounted to \$11,949.31, an increase of 14.9%.

The operating expense for the month was \$2,130.44, compared with \$1,865.86 for May, 1918, an increase of 14.2%.

The net earnings for May, 1919, are \$1,081.55 against \$601.82 for May, 1918, a gain of 79.8%.

The cost of power for the month of May, 1919, was \$419.11 against \$463.69 for the same month of 1918, a saving of \$44.58.

The operations for the month include the carrying of 42,279 revenue passengers, 932 transfers and 1,110 employees and complimentary, making a total of 44,323 passengers.

The cars of the company have run 12,610 car miles during the month, and have produced a revenue of \$25.47 *cents* per car mile.

The number of passengers is still below the number carried in May, 1918, before the increased fare went into operation; the records for May, 1918, showing the number of passengers for that month to be 50,776, or 6,453 more than this year, but [17] the difference seems to be steadily diminishing and the public is apparently becoming reconciled to the conditions which compelled the increased rate of fare. It is believed by the undersigned that within

a short time the company will receive the patronage which should come to it and it is hoped that the increased patronage will justify the improvements which were suggested in a former report.

The Receiver feels compelled to again call the attention of the Court and parties to the situation caused by the Stone Avenue crossing. It still remains a source of expense delay and inconvenience, which materially diminishes the revenue of the company and renders it impossible to maintain a schedule so as to develop the patronage which should come to the company. Its maintenance requires an outlay equal to interest on \$40,000.00 and its situation, where it is subject to the delays caused by the passage of long freight trains at slow speed, and the constant switching across it required by the necessities of the freight station of the Southern Pacific which lies immediately west of it renders it an increasing *imeditment* to the operations of the cars and imperatively demands that it be done away with if possible. It is also productive of exhaustive repairs to the cars, caused by the passage over the five frogs. The writer is convinced that this crossing caused more wear and tear to the cars, (2) especially the motors, than all other service required of them.

Continued observation shows the necessity to make extensions into the territory south of University Avenue and north of the Southern Pacific tracks. Such extensions are necessary to reach the

month of May, the total receipts being \$3,211.99 against \$2,467.68 for May, 1918, an increase of 30.2%. The business for the five months (January 1st to June 1st), 1919, amounts to \$13,727.85, while for a similar period in 1918 the receipts amounted to \$11,949.31, an increase of 14.9%.

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Continued observation shows the necessity to make extensions into the territory south of University Avenue and north of the Southern Pacific tracks. Such extensions are necessary to reach the

mass of the population on which the company must depend for patronage, and would afford an opportunity to serve the High School and thus cultivate a field which seems full of promise. If these extensions could be made and a crossing of the Southern Pacific could be secured free from the dangers and unvexed by the deayls which are inherent in the present crossing, the company would have a most desirable piece of property and one which would adequately serve the public at a fair profit to its owners. [18]

The Receiver desires to acknowledge the cordial co-operation given him by the entire force connected with the operation of the cars.

Respectfully submitted,

EDWIN F. JONES,

Receiver.

Dated at Tucson, Arizona, June 23, 1919.

[Endorsed]:E—70, Tucson. In the District Court of the United States for the District of Arizona. Tucson Gas, Electric Light and Power Company, Plaintiff, vs. Tucson Rapid Transit Company, Defendant. Edwin F. Jones, Receiver. Filed June 23, 1919. Mose Drachman, Clerk. By Effie D. Botts, Chief Deputy Clerk. [19]

In the District Court of the United States in and
for the District of Arizona.

THE TUCSON GAS, ELECTRIC LIGHT AND
POWER COMPANY, a Corporation,
Plaintiff,

vs.

THE TUCSON RAPID TRANSIT COMPANY,
a Corporation,
Defendant.

**Notice of Motion of Asma Rubaiz Call Up for Hearing
Petition for Intervention.**

To the Above-named Plaintiff and Its Attorneys,
the Above-named Defendant and Its Attorney,
and to EDWIN F. JONES, Receiver:

You will please take notice that on Monday, April 5th, 1920, at 10 o'clock A. M. of said day, or as soon thereafter as counsel can be heard, Asma Rubaiz will call up for hearing before the above-entitled court, in the above-entitled cause, at the courtroom of the above-entitled court, in the City of Tucson, County of Pima, State of Arizona, her intervening petition to recover a judgment of a State Court, a copy of which said petition is hereto annexed.

ASMA RUBAIZ.

By MOORE & FRAWLEY,
RICHEY & RICHEY,

Her Attorneys. [20]

In the District Court of the United States in and
for the District of Arizona.

No. E.—70.

THE TUCSON GAS, ELECTRIC LIGHT AND
POWER COMPANY, a Corporation,
Plaintiff,

vs.

THE TUCSON RAPID TRANSIT COMPANY,
a Corporation,
Defendant.

**Intervening Petition of Asma Rubaiz to Recover
a Judgment at State Court.**

To the Honorable District Court of the United
States, in and for the District of Arizona.

Your petitioner, Asma Rubaiz, who resides in St. Mary's Hospital, near the City of Tucson, in the County of Pima, State of Arizona, praying for leave to intervene in the above-styled and numbered cause, and for other orders, respectfully represents to the Honorable Court:

That on, to wit, the 10th day of January, 1918, and prior to the order of this Honorable Court placing the property of the said, The Tucson Rapid Transit Company, a corporation, into the control and possession of the Receiver, Edwin F. Jones, the intervenor herein, said Asma Rubaiz, instituted suit in the Superior Court of the State of Arizona, in

and for the County of Pima, on a claim for damages for personal injuries negligently inflicted on your petitioner by said The Tucson Rapid Transit Company, a corporation.

That thereafter and on the 25th day of June, 1918, and prior to the appointment of said Receiver, your petitioner recovered judgment against said The Tucson Rapid Transit Company, a corporation, (1) in said Superior Court for the sum of \$4,500.00 and \$52.75 costs of suit.

That hereto attached, marked Exhibit "A" and made a part hereof, is a full, true and correct copy of said judgment, duly certified by the Clerk of said Superior Court above mentioned.

That thereafter said The Tucson Rapid Transit Company, a corporation, and said Receiver appealed from said judgment to the Supreme Court of the State of Arizona, and on, to wit, the [21] 2d day of February, 1920, said Supreme Court rendered its judgment affirming the said judgment of said Superior Court, and thereafter and on, to wit, the 18th day of February, 1920, said Supreme Court issued its mandate and forwarded same to said Superior Court, a true and correct copy of said mandate, duly certified by the Clerk of said Superior Court being hereto attached, marked Exhibit "B" and made a part hereof.

That no part or portion of said judgment has been paid and same remains wholly unsatisfied, and by reason of Section 3634 of the Civil Code of the

Revised Statutes of the State of Arizona, 1913, said judgment is a first lien on the personal property of said The Tucson Rapid Transit Company, a corporation, and such lien is entitled to be foreclosed and the amount due on said judgment should be paid by said Receiver prior to any other claim mentioned and described in the bill, petition or complaint of plaintiff above named.

That your petitioner, Asma Rubaiz, is informed and believes and upon such information and belief alleges that the said Receiver, Edwin F. Jones, now has on hand as current receipts as the result of managing and operating the properties of said The Tucson Rapid Transit Company, the sum of approximately \$7,000.00, and that same or any part thereof is not essential or necessary for the operation or management expenses of the property of said the Tucson Rapid Transit Company. (2)

That your intervenor, through her attorneys, has demanded payment of said judgment and the payment has been refused, and that there is now due and unpaid on said judgment the sum of \$4,552.75, with interest thereon from the 25th day of June, 1918, at the rate of 6% per annum, and the further sum of \$106.00, costs in the said Supreme Court, together with interest thereon from the 2d day of February, 1920, at the rate of 6% per annum.

And this intervenor says said judgment is a first and prior lien on the personal property of said The Tucson Rapid Transit Company, a corporation,

within the County of Pima, State of Arizona, including said sum of money in the hands of said receiver, and prays an order of the Honorable Court conferring the same as such first [22] and prior lien and for the further order for the immediate payment thereof by said Receiver.

And the intervenor prays for such further or other orders respecting said claim as may seem to the Honorable Court equitable, proper, and necessary under the fact, and so as in duty bound will ever pray.

MOORE & FRAWLEY,
RICHEY & RICHEY,

Attorneys for Intervenor, Asma Rubaiz.

State of Arizona,
County of Pima,—ss.

Asma Rubaiz, being first duly sworn, on her oath says: That she is the petitioner in intervention above named; that she has read the foregoing petition in intervention and knows the contents thereof, and that the same is true in substance and in fact, except as to those matters stated on information and belief, and as to those matters she believes it to be true.

ASMA RUBAIZ.

Subscribed and sworn to before me this 1st day of April, 1920.

[Seal]

A. T. SMITH,
Notary Public.

My commission expires May 12, 1920. [23]

Exhibit "A."

In the Superior Court, County of Pima, State of
Arizona.

ASMA RUBAIZ,

Plaintiff,

vs.

TUCSON RAPID TRANSIT COMPANY, a Cor-
poration,

Defendant.

Judgment.

This cause came on regularly for trial in the above-entitled court on the 24th day of June, 1918, and thereafter and on the 25th day of June, 1918, continued, the plaintiff, Asma Rubaiz, appearing in person and by her attorneys, Messrs. Richey & Richey, E. B. Frawley and Kirk T. Moore, and the defendant, Tucson Rapid Transit Company, a corporation, appearing by its attorney, S. L. Kingan, a jury of twelve persons was regularly and duly impaneled and sworn to try said action. Witnesses on the part of plaintiff were duly sworn, examined and cross-examined, and other evidence introduced, and at the request of attorney for the defendant the Court submitted to the jury to be by them answered, two several special interrogatories, to wit:

Did the plaintiff in this case alight or attempt to alight from the street-car before it had stopped at all and while it was still moving?

If you answer the above question in the affirmative then did the act of the plaintiff in getting off or attempting to get off said car while it was in motion, proximately contribute to the injury?

After hearing and receiving the evidence, the instructions of the Court, the said interrogatories, and the arguments of the attorneys for plaintiff and defendant, the jury retired to consider said interrogatories and their verdict, and subsequently returned into court, and being called, answered to their names, and say they answer said interrogatories and find a verdict for the plaintiff as follows, to wit:

Did the plaintiff in this case alight or attempt to alight from the street-car before it had stopped at all and while it was still moving?

Answer: No.

JULIAN JOHNSON,

Foreman.

If you answer the above question in the affirmative, then did the act of the plaintiff in getting off or [24] attempting to get off said car while it was in motion, proximately contribute to the injury?

Answer: ———.

In the Superior Court of Pima County, State of
Arizona.

No. 6334.

ASMA RUBAIZ,

Plaintiff,

vs.

TUCSON RAPID TRANSIT COMPANY, a Cor-
poration,

Defendant.

We, the Jury duly impanelled and sworn in the
above-entitled cause, upon our oaths do find for the
plaintiff, and fix the amount of her recovery in the
sum of Forty-five Hundred & no/100 (\$4500.00)
Dollars.

JULIAN JOHNSON,

Foreman.

WHEREFORE, by virtue of the law, and by rea-
son of the premises aforesaid, it is ordered and ad-
judged that the plaintiff, Asma Rubaiz, do have and
recover of and from the defendant, Tucson Rapid
Transit Company, a corporation, the sum of Forty-
five Hundred Dollars (\$4500.00), together with said
plaintiff's costs in said action amounting to the sum
of \$52.75.

Done in open court this 25th day of June, 1918.

SAMUEL L. PATTEE,

Judge.

[Endorsed]: 6334. In the Superior Court, County of Pima, State of Arizona. Asma Rubaiz, Plaintiff, vs. Tucson Rapid Transit Company, a Corporation, Defendant. Judgment. Filed July 2, 1918, at 4:30 P. M. S. A. Elrod, Clerk.

State of Arizona,
County of Pima,—ss.

I, Olive G. Failor, Clerk of the Superior Court of Pima County, State of Arizona, do hereby certify that I have compared the within and foregoing copy of judgment in the case of Asma Rubaiz, plaintiff, vs. Tucson Rapid Transit Company, a corporation, defendant, No. 6334, with the original record of the same remaining in this office, and that the same is a true and correct transcript therefrom.

WITNESS my hand and seal of said court affixed this first day of April, A. D. 1920.

[Seal]

OLIVE G. FAILOR,

Clerk.

By M. S. Brown,
Deputy Clerk. [25]

Exhibit "B"—Mandate.

In the Supreme Court of the State of Arizona.
To the Honorable the Superior Court of the
State of Arizona, in and for the County of
Pima, GREETING:

WHEREAS, lately in the Superior Court of the State of Arizona in and for the County of Pima, before you in a cause between Asma Rubaiz, plain-

tiff, and Tucson Rapid Transit Company, a corporation defendant, No. 6334; wherein the judgment of the said Superior Court, made and entered in said cause on the 25th day of June, 1918, is in the following words, viz.:

“ . . . WHEREFORE, by virtue of the law, and by reason of the premises aforesaid, it is ordered and adjudged that the plaintiff, Asma Rubaiz, do have and recover of and from the defendant, Tucson Rapid Transit Company, a corporation, the sum of Forty-five Hundred Dollars (\$4500.00), together with said plaintiff's costs in said action, amounting to the sum of \$52.75.

Done in open court this 25th day of June, 1918.

SAMUEL L. PATTEE,
Judge.”

as by the inspection of the record of the said Superior Court, which was brought into the Supreme Court of the State of Arizona by virtue of an appeal by the defendant, Tucson Rapid Transit Company, agreeably to the law in such case made and provided fully and at large appears.

AND WHEREAS, in October, in the year of our Lord one thousand nine hundred and nineteen, the said cause came on to be heard before the said Supreme Court and was submitted after argument by counsel.

ON CONSIDERATION WHEREOF, it was on the second day of February in the year of our Lord one thousand nine hundred and twenty, ordered by this court that the judgment of the said Superior Court in this cause, be, and the same is hereby affirmed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Asma Rubaiz, appellee herein, do have and recover of and from the Tucson Rapid Transit Company, a corporation, appellant herein, as principal, and E. E. Russell and Alexander Rossi, sureties on cost bond on appeal herein, the principal sum of Forty-five Hundred (\$4500.00) Dollars, with interest thereon at the rate of six per cent per annum from the 25th day of June, 1918, until paid; together with her costs in the [26] lower court in this cause incurred, taxed and allowed at the sum of Fifty-two and 75/100 (\$52.75) Dollars, and her cots in this court, taxed at the sum of One Hundred and Six (\$106.00) Dollars.

You therefore are hereby commanded that such proceedings be had in said cause, as according to right and justice, and to law, ought to be had, the said appeal notwithstanding.

WITNESS, the Honorable D. L. CUNNINGHAM, Chief Justice of the Supreme Court of the State of Arizona, the eighteenth day of February, in th year of our Lord one thousand nine hundred and twenty.

C. F. LEONARD,
Clerk of the Supreme Court of the State of Arizona.

COSTS OF APPELLEE.

Clerk	\$15.00
Reporter's transcript .. .	27.00
Transcript of record.....	
Abstract of record.....	
Brief	64.00
	<hr/>
	\$106.00

[Endorsements]: 6334. No. 1741. Supreme Court of the State of Arizona. Tucson Rapid Transit Company, a Corporation, Appellant, vs. Asma Rubaiz, Appellee. Mandate. Filed Feb. 20, 1920. O. G. Failor, Clerk. By L. V. Clawson, Deputy.

State of Arizona,
County of Pima,—ss.

I, Olive G. Failor, Clerk of the Superior Court of the State of Arizona, in and for the County of Pima, do hereby certify that I have compared the foregoing copy of Mandate of the Supreme Court of the State of Arizona, in the case of Tucson Rapid Transit Company, a Corporation, Appellant, vs. Asma Rubaiz, Appellee, No. 1741, with the original records of the same remaining in this office, and that the same are true and correct transcripts therefrom.

WITNESS my hand and seal of said court affixed
this 1st day of April, 1920.

[Seal]

O. G. FAILOR,

Clerk.

Leslie L. Hubbard,

Deputy.

[Endorsement]: In the District Court of the
United States, in and for the District of Arizona.
The Tucson Gas, Electric Light and Power Com-
pany, a Corporation, Plaintiff, vs. The Tucson
Rapid Transit Company, a Corporation, Defendant.
No. E.—70. Intervening Petition to Recover a
Judgment of a State Court. Copy of within ac-
knowledged this 1st day of April, 1920. Kingan
& Campbell, Attorneys for Plaintiff. Geo. O. Hil-
zinger, Attorney for Defendant. Edwin F. Jones,
Receiver. Filed Apr. 1, 1920. C. R. McFall,
Clerk. By J. Lee Baker, Chief Deputy Clerk. [27]

In the District Court of the United States, in and
for the District of Arizona.

E.—70.

TUCSON GAS, ELECTRIC LIGHT AND
POWER COMPANY, a Corporation,
Plaintiff,

vs.

TUCSON RAPID TRANSIT COMPANY, a Cor-
poration,
Defendant.

Report of Receiver.

The undersigned, receiver appointed in this cause, begs leave to report the result of the year's operations of the property under his receivership.

There is on hand in cash, deposited to the credit of the receiver, in the Arizona National Bank of Tucson, the sum of \$8,368.77, which sum is the result of the year's operations, after the payment of the absolute costs and expenses of conducting the business of the company. At the time the undersigned was appointed receiver, there was only a small balance of about \$100.00 turned over to him.

The Receiver calls the attention of the Court to the increased gross revenue for the month of March over that of the corresponding month of last year, the figures being \$3,560.15 for March, 1920, and \$2,735.71 for March, 1919, being an increase of \$824.44, of 30.1 per cent. For the same period the operating expenses were \$2,784.02 in March, 1920, against \$2,688.29, an increase of \$95.73, or 3.6 per cent.

Since the first day of October, the public has seemed more inclined to ride at the increased fare, which was raised just prior to the appointing of the Receiver, from five to eight cents. Prior to that time the increased price of passage was almost equalled by the decrease in passengers carried, and the Receiver believes that the company will earn a small surplus each month of approximately \$500

to \$750, excepting during the months of June, July and August, during which months the University of Arizona is not in session, and the patronage is consequently much reduced. The Receiver hopes, during these months, to have the operating revenue equal the expenses. [28] During the month of March, 1920, the total number of revenue passengers carried by the company has been 46,684 against 36,042 for the month of March, 1919. The number of car miles operated is practically the same, being 12,642 in March, 1920, and 12,657 in March, 1919. The amount paid for power during the month of March, 1920, is \$492.72 as against \$507.96 for the corresponding month of last year, being a decrease of \$15.24 for that item.

The Receiver again calls the attention of the Court to the fact that the operations of the company are greatly hindered, and its power to maintain its schedule destroyed by the physical conditions which exist at the Stone Avenue crossing. As before pointed out, this crossing is at the foot of the grade coming into Tucson from the west, and the long freight trains of the Southern Pacific are stopped just west of this point and a helper engine is attached, and these long trains are pulled slowly up the grade at a rate not exceeding four or five miles an hour frequently resulting in the complete stoppage of the cars from fifteen to twenty minutes. The schedule of the cars from

Stone Avenue to the University being only twenty minutes apart, it is manifest that such delays are absolutely destructive to the ability of the company to maintain its schedule, and consequently the Receiver has been unable to build up the service based upon prompt and regular transportation. (2)

The attention of the owners has been frequently called to this state of facts, but no remedy has been suggested to the undersigned, and he has no means within his power to remove or alleviate the situation which is thus created.

The Receiver believes that if a crossing could be secured which is free from the delays and relieved of the dangers which infest this crossing, that a considerable increase of patronage could be secured, even with the present plant of the company, and if sufficient money were invested in the property to afford it a line from the University in the direction of the Country Club, and either through the subway at the head [29] of Congress Street or back to the junction of the line just north of the Stone Avenue crossing, the receipts could be doubled with an increase in operating expenses not to exceed 25 per cent. These matters have also been called to the attention of the owners of the property, but so far the Receiver has been unable to secure any alleviation of these conditions.

The City of Tucson has already passed an ordinance to pave Stone Avenue North from the crossing to the Southern Pacific Railroad to and beyond

Third Street, or University Avenue, and this will compel the paving of the north four blocks by the street-car company in order to maintain its franchise, the franchise specifically providing that it may be declared *forfeit* upon the failure of the company to pave at any time when required by the City Council. The contract has already been let for the paving of Stone Avenue over the above distance.

The amount of money in the hands of the Receiver will about be sufficient to make this paving, if the Court should authorize its expenditure for that purpose, but the Receiver has been notified of the filing of a petition by Asma Rubiaz to have her judgment, which now amounts to about \$5,000, paid out of the funds now in the hands of the Receiver, and there (3) will be due in May, \$674.00 of taxes due the State of Arizona and County of Pima, which will have to be paid. He is also informed that the trustee of the bondholder will intervene and seek to have said money applied to the interest on their mortgage, or to the use and protection of the property covered by said mortgage, the said trustee claiming that the entire property of the company is covered by its mortgage, and that outside of the actual expenses of operation, the money in the hands of the Receiver should be applied to the payment of their interest *pro tanto*, and that the same be applied to the paving of said road, as above set out, in order that this

franchise may be preserved, and the value of its security be improved.

If the Court should be of the opinion that the money in the hands of the Receiver cannot be used for the purpose of paying the paving already ordered by the City of Tucson, and [30] thus preserve the franchise of the company, the Receiver respectfully requests that he be instructed as to his duty in the premises.

The receiver is of the opinion that the company cannot hope for any greatly increased revenue with its present plant, hampered by the present Stone Avenue crossing, and therefore submits the facts to the Court for its information, with the request for such orders and decrees as the Court may deem just and proper.

Respectfully submitted,

EDWIN F. JONES,

Receiver. (4)

[Endorsed]: In the District Court of the United States, in and for the District of Arizona. Tucson Gas, Electric Light and Power Company, a Corporation, Plaintiff, vs. Tucson Rapid Transit Company, a Corporation, Defendant. Report of Receiver. E.—70. Filed Apr. 23, 1920. C. R. McFall, Clerk. [31]

In the United States District Court, in and for
the District of Arizona.

E.—70.

TUCSON GAS, ELECTRIC LIGHT AND
POWER COMPANY, a Corporation,
Plaintiff,

vs.

TUCSON RAPID TRANSIT COMPANY, a Cor-
poration,

Defendant,

and

ASMA RUBIAZ,

Intervenor.

**Notice of Motion of The International Trust Com-
pany to Call Up for Hearing Petition for Inter-
vention.**

To the Above-named Plaintiff and the Above-
Named Defendant and Its Receiver, Edwin F.
Jones, and Asma Rubiaz and Her Attorneys,
Intervenor:

YOU WILL PLEASE TAKE NOTICE, that on
the 29th day of Apr. 1920, at ten o'clock in the fore-
noon of said date, or as soon thereafter as counsel
may be heard, *The International Trust Company*
will present for hearing before the above-entitled
court in the above-entitled cause, and at the court-
room of the above-entitled court, in the city of
Tucson, Arizona, its motion and petition to be per-

mitted to intervene in the above-entitled action. A copy of the petition for intervention and of the proposed complaint in intervention of the intervenor is attached hereto.

KINGAN & CAMPBELL,
Attorneys for International Trust Company.

[Endorsed]: No. E.—70. In the United States District Court, in and for the District of Arizona. Tucson Gas, Electric Light & Power Company, a Corporation, Plaintiff, vs. Tucson Rapid Transit Company, a Corporation, Defendant, and Asma Rubiaz, Intervenor. Notice of Motion. Service admitted this 26th April, 1920. Richey & Richey, Moore & Frawley, both Attys. for Asma Rubiaz, Intervenor. Edwin F. Jones, Receiver. Filed Apr. 26, 1920. C. R. McFall, Clerk. [32]

In the United States District Court, in and for the
District of Arizona.

E.—70.

TUCSON GAS, ELECTRIC LIGHT & POWER
COMPANY, a Corporation,

Plaintiff,

vs.

TUCSON RAPID TRANSIT COMPANY, a Corporation,

Defendant,

and

ASMA RUBIAZ,

Intervenor.

Petition for Intervention.

To the Honorable WILLIAM H. SAWTELLE,
Judge of Said Court:

Comes now THE INTERNATIONAL TRUST COMPANY, a Corporation, under the laws of the State of Colorado, and having its principal place of business in the city of Denver, said state, and respectfully petitions this Court for permission to intervene in the above-entitled cause, and your petitioner presents herewith and attached hereto and by reference made a part hereof its complaint in intervention and prays this Honorable Court to consider all of the matters and things set forth in said complaint in intervention to be read as and deemed a part of this petition to intervene.

Your petitioner respectfully represents that by reason of the matters and things set forth in said complaint it should and by right ought to be permitted to intervene and become a party in the above-entitled cause.

WHEREFORE, your petitioner prays for an order of this Honorable Court permitting it to file its said complaint in intervention and to be made a party in the above-entitled cause.

KINGAN & CAMPBELL,
Attorneys for Petitioner. [33]

[Endorsed]: No. —. In the United States District Court, in and for the District of Arizona.

Tucson Gas, Electric Light & Power Company, a Corporation, Plaintiff, vs. Tucson Rapid Transit Company, a Corporation, Defendant, and Asma Rubiaz, Intervenor. Petition to Intervene. Filed Apr. 26, 1920. C. R. McFall, Clerk. [34]

In the United States District Court, in and for the
District of Arizona.

TUCSON GAS, ELECTRIC LIGHT & POWER
COMPANY, a Corporation,

Plaintiff,

vs.

TUCSON RAPID TRANSIT COMPANY, a Corporation,

Defendant,

and

ASMA RUBIAZ and THE INTERNATIONAL
TRUST COMPANY, a Corporation,

Intervenors.

Complaint in Intervention.

To the Honorable WILLIAM H. SAWTELLE,
Judge of the Aforesaid Court:

Comes now The International Trust Company,
and respectfully shows to the Court:

I.

That it is a corporation duly incorporated and existing under and by virtue of the laws of the State of Colorado, and having its principal place of busi-

ness at the city of Denver, said state; that the Tucson Rapid Transit Company is a corporation under the laws of Arizona, and having its principal place of business at the city of Tucson, in said state; that The Tucson Gas, Electric Light & Power Company, is a corporation duly organized under and by virtue of the laws of Colorado, and with its principal place of business in the city of Tucson, Arizona; that the intervenor, Asma Rubiaz is, as your petitioner and complainant is advised, a resident of said city of Tucson. (1)

II.

That your petitioner and complainant is, among other things, authorized and empowered by its articles of incorporation to act as trustee and to take, have and accept trusts, especially those of the character hereinafter described.

III.

That heretofore and on the 15th day of March, 1906, [35] the said Tucson Rapid Transit Company caused to be duly executed and delivered to your complainant a certain indenture of trust, wherein and whereby the said Tucson Rapid Transit Company did convey and transfer to your said petitioner all of its property and rights which it then had or might thereafter acquire, and which said indenture of trust, so duly executed, delivered and accepted by your complainant, is in the words and figures as follows, to wit:

This indenture made this 15th day of March,

A. D. 1906, by and between The Tucson Rapid Transit Company, a corporation, duly organized and existing under and by virtue of the laws of the Territory of Arizona (hereinafter referred to as the Transit Company), the party of the first part, and The International Trust Company, a corporation duly organized and existing under and by virtue of the laws of the State of Colorado, having its principal place of business in Denver, Colorado (and hereinafter referred to as the Trustee), party of the second part,

Witnesseth: Whereas said Transit Company, in accordance with the laws of the Territory of Arizona, and by virtue of the provisions of the articles of incorporation thereof, has full power and authority to issue and sell the bonds and to secure the payment thereof by mortgage upon all or any part of the property of said company; and

Whereas, by virtue of the provisions of the said articles of incorporation of said company, the board of directors thereof is expressly authorized and empowered to issue and cause to be executed the bonds and debentures of said company and to authorize and direct the execution of mortgages or other security upon and with heference to the real and personal property of said company for the purpose of securing the payment of such bonds and debentures; and

Whereas, the Transit Company procured and holds a franchise from the City of Tucson in the

Territory of Arizona, extending over a period of twenty-five years, to construct and operate a line or lines of street railway in said city, by electricity or mechanical power, and has purchased, taken over and acquired the real and personal property, plant and equipment (2) [36] of the Tucson Street Railway, a corporation formerly engaged in operating a street railway system in the said City of Tucson, and intends to convert the said railway system into an electric system, and to enlarge and extend the same; and

Whereas, in order to the purchase and acquisition of said property, and to carry out the purposes for which the Transit Company was organized, it is necessary and proper for said company to issue and sell its bonds, secured by mortgage or deed of trust upon all its property and assets; and

Whereas, at a meeting of the stockholders of said Transit Company, duly called and held in the City of Tucson, Arizona, at which meeting more than two-thirds of the entire capital stock of said company was represented and voting the following resolution having been offered, was duly adopted, more than two-thirds of the entire capital stock of the company being voted in favor thereof, to wit:

“Whereas, the Tucson Rapid Transit Company has purchased all the property, plant and equipment of the Tucson Street Railway with the intention of converting it into an electric system, and enlarging and extending its service; and

Whereas, to provide a fund to cover the purchase price of said property, and to carry out such purposes, it is necessary and desirable for the company to issue its bonds, secured by mortgage on the property or to be acquired by it; and

Whereas, although the board of directors of the company has full power and authority to order the issuance of such bonds, and the execution and delivery of such mortgage, yet it is desirable that the stockholders of the company take some formal action with respect thereto; ,

Now, Therefore, Be It Resolved, that the Tucson Rapid Transit Company, for the purposes aforesaid do issue its certain bonds for the aggregate principal amount of \$300,000, to bear date March 15, 1906, and to be payable twenty-two years from their said date (subject to be called in and retired prior thereto upon such terms as may be contained in the mortgage) in gold [37] coin of the United States of America, with interest at the rate of 6% per annum, payable semi-annually, and evidenced by coupons to said bonds attached; that to secure the payment of said bonds and coupons, the company execute its first mortgage or deed of trust to the International Trust Company, of Denver, Colorado, as trustee, such mortgage to constitute a first lien upon all the real, personal and mixed property, of whatever kind or character now owned or hereafter acquired by said company; that said bonds and moregage or deed of trust shall be in such form

and contain such provisions, terms and conditions, as to the board of directors and the officers of said company may seem best, such bonds to the aggregate amount of \$150,000 to be at once issued and certified, and be used and disposed of at such rate and upon such terms as the board of directors may determine, it being, however, contemplated that after the execution and issuance of such bonds to the aggregate amount of \$150,000, none of the remaining bonds shall be issued or certified except after the expenditure for new construction or new equipment at the rate of \$1,250.00 for each \$1,000. of additional bonds so issued or certified; and (3)

Whereas, the board of directors of said transit company thereafter and at a meeting thereof, duly called and held, did by unanimous vote of all the directors of the company, adopt the following resolution:

Whereas, the Tucson Rapid Transit Company has purchased all the property, plant and equipment of the Tucson Street Railway with the intention of converting it into an electric system and enlarging and extending its service; and

Whereas, to provide a fund to cover the purchase price of said property and to carry out such purpose it is necessary and desirable for the company to issue its bonds secured by mortgage on the property held or to be acquired by it; and

Whereas, the board of directors of said company

is fully authorized to order the issuance of such bonds and the execution and delivery of such mortgage;

Now, Therefore, Be It Resolved, that the Tucson Rapid Transit [38] Company for the purpose aforesaid, do issue its 370 bonds for the aggregate principal amount of Three Hundred Thousand Dollars numbered from 1 to 370, bonds numbered from 1 to 270 being each for the sum of One Thousand Dollars, bonds numbered from 271 to 320 for the sum of Five Hundred Dollars each; and bonds numbered from 321 to 370 for the sum of One Hundred Dollars each, all of said bonds to bear date of March fifteenth, 1906, and to be payable twenty-two years from their date in gold coin of the United States of America, of the present standard of weight and fineness, with interest at the rate of six per cent per annum, payable semi-annually, in like gold coin, and evidenced by coupons to said bonds attached; that to secure the payment of said bonds and coupons, the company execute a first mortgage or deed of trust to the International Trust Company, of Denver, Colorado, as Trustee for the holders of said bonds, such mortgage to constitute a first lien upon all the real, personal and mixed property, assets, revenues and corporate and other franchises of this company, now owned or hereafter acquired. That said bonds shall be subject to be called in and retired upon the payment during the first five years of a premium of three per cent, during the second

five years upon the payment of a premium of two per cent, and thereafter at par without premium. Bonds to the aggregate amount of One Hundred and Fifty Thousand Dollars shall be immediately certified and issued to the president and secretary of this company to be used in providing for the purchase of said property, plant and equipment, and the conversion of said railway lines into an electric system, and for the immediate extension thereof. After the execution and issuance of bonds to the aggregate amount of One Hundred and Fifty Thousand Dollars, no other bonds shall be issued or certified except after the valid and actual expenditure for new construction or new equipment at the rate of twelve hundred and fifty dollars for every one thousand dollars of additional bonds so issued or certified, the fact of such expenditure being certified to the Trustee by the president (or vice-president) and treasurer of the company. That the president and secretary of this company [39] be, and they hereby are authorized in the name and on behalf of the company, to execute the said bonds and to execute, acknowledge and deliver the said mortgage or deed of trust, such bonds and mortgage or deed of trust to be in such form and to contain such provisions and conditions as to them may seem best."

And (4)

Whereas, this indenture and the terms in which it now appears, and the bonds as hereinafter in sub-

stance set forth, were duly examined and approved by said board of directors at said meeting and the execution, issuance and delivery thereof by the officers of the Transit Company, were authorized and directed.

And, Whereas, said bonds, with interest coupons attached, have been executed and are now ready to be certified by the Trustee and issued as authorized, and directed as aforesaid, said bonds being consecutively numbered from 1 to 370, inclusive, the bonds numbered from 1 to 270, inclusive, being in the denomination of \$1,000.00 each, the bonds numbered from 271 to 320 being in the denomination of \$500.00 each, and the bonds numbered from 321 to 370 being in the denomination of \$100.00 each, and the coupons attached to each of said bonds, bearing the number of the bond to which they are attached, being also consecutively numbered 1 to 44, inclusive, which bonds numbered from 1 to 270 inclusive and coupons thereon and the Trustee's certificate endorsed upon said bonds are substantially in the following form, the other bonds and coupons being in similar form though in different denominations as above set forth, to wit:

“United States of America.

First Mortgage Sinking Fund Six per cent, 22-Year
Bond of

No. ———.

\$1,000.00

The Tucson Rapid Transit Company,

Total Authorized Issue \$300,000.

The Tucson Rapid Transit Company, a body corporate organized and existing under the laws of the Territory of Arizona, for value received, acknowledge itself indebted and hereby promises to pay, to the bearer, one thousand dollars in gold coin [40] of the United States of America, of the present standard weight and fineness at the office of the International Trust Company in the City of Denver, State of Colorado, or at the office of the Morton Trust Company, in the City of New York, State of New York, on the fifteenth day of March, A. D. 1928, with interest thereon in like gold coin at the rate of six per cent per annum payable semi-annually, on the 15th day of March and the fifteenth day of September of each year, at the office of the International Trust Company aforesaid, or of said The Morton Trust Company upon presentation and surrender of the annexed coupons as they severally become due. All payments upon this bond of both principal and interest are to be made without the deduction of any tax or taxes which the obligor may be required to pay, or to retain therefrom by any present or future laws of the United States of America, or

any of the states or territories thereof, the obligor hereby covenanting and agreeing to pay any and all such taxes. This bond is one of a series aggregating the principal sum of three hundred thousand dollars, consisting of three hundred and seventy bonds numbered consecutively from 1 to 370, the bonds numbered from 1 to 270 inclusive, being each for the sum of one thousand dollars, and the bonds numbered from 271 to 320 inclusive, being each for the sum of five hundred dollars, and the bonds numbered from 321 to 370 inclusive, being each for the sum of one hundred dollars, but otherwise all of said bonds are of the same date, tenor and effect, and all are equally secured by deed of trust of even date herewith, made, executed and delivered by the said The Tucson Rapid Transit Company, pursuant to the requisite, necessary, proper and authorized action (5) of its board of directors to The International Trust Company of Denver, Colorado, as Trustee, conveying all the franchises and property, real and personal, now owned or hereafter to be acquired by the Tucson Rapid Transit Company, all as in said deed of trust which has been duly recorded, and is a first lien on all the property therein described, more specifically mentioned and provided. After bonds to the aggregate amount of one hundred fifty thousand dollars have been issued and certified no additional bonds of the issue authorized hereby are to be issued or certified except after the [41]

valid and actual expenditure for new construction or new equipment at the rate of twelve hundred and fifty dollars for every one thousand dollars of additional bonds so issued or certified, the fact of such expenditure being certified to the trustee by the president (or vice-president) and treasurer of the company. This bond is entitled to the benefit of a sinking fund according to the provisions of the said Deed of Trust.

The Tucson Rapid Transit Company reserves the right to redeem and pay any and all of the bonds of this issue on any date for the payment of semi-annual interest, upon the payment of the principal thereof, together with the accrued interest, and in case of the redemption thereof within ten years from the date hereof, upon the payment of the certain premiums as provided by the trust deed herein referred to, after prior notice of its intention so to do, shall have been given as required by the terms of said trust deed. In the event of the nonpayment of any interest coupon hereto attached, or breach of any other condition in said deed of trust contained, the principal hereof shall become due in the manner provided in said deed of trust. The obligor hereby certifies that all acts, conditions and things required to be done precedent to and in connection with the issuing of this bond to make it a valid and enforceable obligation of said corporation as a matter of law, have been, in fact and law, properly done, have happened and

been performed and did exist in regular and due time, form and manner as required by law, and that this bond is in all respects regular and valid. This bond shall not be valid unless the certificate endorsed hereon shall bear the signature of the said Trustee.

In Witness Whereof, the said The Tucson Rapid Transit Company has caused this bond to be sealed with its corporate seal, signed by its president and attested by its secretary, and has likewise caused each of the attached coupons to be authenticated by a lithographed facsimile of its treasurer's signature this 15th day of March, A. D. 1906.

THE TUCSON RAPID TRANSIT COMPANY,

By _____,
President.

(Corporate Seal)

Attest: _____,
Secretary. [42]

(Coupon)

\$30.00

\$30.00

The Tucson Rapid Transit Company will pay to the bearer at the office of The International Trust Company, Denver, Colorado, or at The Morton Trust Company, in the City of New York, on the — day of —, 19—, thirty dollars in gold coin of the United States, being six months interest on Bond No. —.

_____, Treasurer. (6)

(Trustee's Certificate)

The undersigned trustee named in the within bond and in the trust deed therein referred to certifies that this bond is one of a series of three hundred and seventy bonds specified in said deed of trust.

THE INTERNATIONAL TRUST COM-
PANY, Trustee.

By _____,
Vice-President.

(Registration)

This bond may be registered at the option of the owner upon the books of The Tucson Rapid Transit Company kept at the office of The International Trust Company of Denver, Colorado, such registration to be also noted hereon. If registered, it shall pass only by transfer on said books noted also on this bond, but it may be discharged from registration by being so transferred to bearer after which it shall pass by delivery until again registered. The coupons shall in all cases be negotiable by delivery, whether the bond itself be registered, or not. The trustee of the indenture within mentioned shall not be bound to take notice of, or in any way to see to the execution of any trust, express or implied or constructive, affecting the title to or ownership of this bond, or the principal or interest therein specified, or be affected by notice of any equity that may be subsisting in respect thereof.

Date of registry, name and address of registered owner, transfer agt.”

Now, Therefore, This Indenture Witnesseth: That the said Transit Company in consideration of the premises and of one [43] dollar to it in hand paid by the Trustee, the receipt whereof is hereby acknowledged, and in order to secure the payment of said bonds and coupons and the due and faithful observance of each and all of the covenants and obligations of this deed of trust, has granted, bargained, sold, conveyed and confirmed, and by these presents does grant, bargain, sell, hypothecate, pledge, assign, transfer, set over, release, convey and confirm unto the said party of the second part as trustee, and its successor and successors in this trust herein, and hereby created and declared, its and their assigns, forever, the following described premises situate, lying and being in the city of Tucson, in Pima County, in the Territory of Arizona, to wit:

Lot numbered eleven (11) in block numbered fifty-one (51) of the said city of Tucson, according to the official survey and the map thereof; also all the other property of the Transit Company including all lands, real estate, rights of way, and all privileges and appurtenances connected therewith, all licenses, easements and buildings, all its road bed, tracks, railway plant, machinery, engines, boilers, dynamo electric machines, generators, motors and all other electrical and mechanical

appliances and apparatus, rolling stock, cars, poles, lines, wires, conduits, tools, fixtures, supplies and all other property, real, personal and mixed, of whatever description and wherever situate, and whether now held or hereafter acquired by it, together with all and singular the tenements, hereditaments, privileges and appurtenances thereunto belonging, or in anywise appertaining, all things in action, stocks, bonds or other securities, contracts, claims and demands of the Transit Company, whether now owned or hereafter acquired, together with all and (7) singular the rents, issues, profits, income, privileges, immunities and franchises, corporate or otherwise, growing out of or appertaining to said property of said Transit Company, and whether now owned or hereafter acquired, and also all the estate, interest and claim whatsoever in law as well as in equity which the said Transit Company has in and to the premises and property hereby conveyed (or intended to be) unto said Trustee, its successors and assigns, and with full power on the part [44] of the Trustee, so far as it lawfully may, to succeed to or enjoy all the rights, privileges, immunities and franchises, corporate and otherwise, of said Transit Company.

To Have and to Hold, the above-described property, rights, franchises and privileges unto the said party of the second part, its successor and successors in said trust, and their and each of their assigns to their own proper use, benefit and behoof

forever, but in trust, nevertheless, under the terms of this indenture for the uses and purposes herein set forth. For the further carrying into effect of this conveyance the Transit Company hereby appoints the Trustee and its successors in the trust, the attorneys for the Transit Company, in its name and behalf, to ask, demand and receive payment and delivery of any and all sums of money, notes, chattels, and effects assigned and transferred to the Trustee by this indenture, or intended so to be, and to give effectual releases and discharges in the name of the Transit Company to the party or parties making such payment or delivery. And for any or all of the purposes aforesaid, or of this instrument, the Trustee may appoint an attorney, or attorneys, agent or agents, may from time to time revoke such appointments, may use the name of the Transit Company and generally act in relation to the premises as it or they may think best.

Article I. Said property rights, privileges and franchises, subject to the terms, conditions and agreements herein contained, shall be held and disposed of by the trustee for the equal *pro rata* benefit and security of the person or persons who are or shall be the lawful owners of the said bonds and coupons without any preference of one bond over another, by reason of priority of issue, or of any act or thing whatsoever, and without any preference of bond over coupon, provided, however, that until default shall be made in the payment of prin-

incipal or interest of said bonds or some of them, or in the performance by the Transit Company of some one or more of the covenants of the said bonds or coupons, or of this indenture, the Transit Company shall possess, operate, maintain and enjoy all the franchises, rights and property of every kind conveyed by this [45] deed of trust, and every part thereof, with the appurtenances, and to take and use the income, rents, issues and profits thereof, in the same manner and with the same effect as if this deed had not been made.

Article II. If the Transit Company shall well and truly pay the principal of said bonds, and each of them, together with the interest thereon, when the same shall become due and payable, according to the true intent and meaning of these presents, and shall well and truly perform all the other things required by these presents to be done by it, then and thereupon all the estate, right, title and interest of the trustee hereunder shall cease and determine.

Article III. In case the Transit Company shall fail to pay said coupons or any of them, according to the tenor thereof, on the presentation of the same, respectively, or if the (8) Transit Company shall fail to observe and perform any of the requirements made of it by these presents, or by said bonds, or coupons, and such default or failure shall continue for the space of sixty days, then the Trustee may in writing notify the Transit Company of such default or failure, and if the same

shall continue for thirty days after the receipt of such notice, then and thereupon the whole amount of the principal of said bonds, together with all accrued and unpaid interest (unless such default be waived by the holders of seventy-five per centum in amount of the bonds outstanding, as hereinafter provided) shall, at the election of the Trustee (notwithstanding any provisions to the contrary in said bonds), be deemed immediately due and payable and that the trustee shall not be required to signify such election in any manner other than by instituting proceedings to foreclose, whether by entry upon the premises, by beginning suit, or action for foreclosure, or by commencing publication of notice of the sale of the mortgaged property. In case of default or failure as aforesaid, or in case of the default in the payment of said bonds, or any of them, when they fall due and become payable, it shall be lawful, but not obligatory upon the Trustee to enter upon and take possession of the mortgaged premises, making the entry upon [46] any portion thereof in the name of the whole, and to operate and manage the property and business of the Transit Company, collecting all the revenues, issues and profits of the property and business until the net earnings and profits after the payment of all the reasonable and just charges and expenses of the Trustee, its agents and attorneys, shall have been sufficient to repair and make good all the defaults

of the Transit Company under these presents. After default as aforesaid, the Trustee may also or instead of so doing, and with or without taking any possession of the property, proceed to sell and dispose of, by one sale or successively through several sales, all and singular the premises and property, rights, interest, and franchises hereby conveyed and mortgaged or intended to be, and such portion thereof, as the Trustee may deem necessary, at public auction, in the City of Tucson, in the county of Pima, and Territory of Arizona, on such terms as to credits, partial credits, and security for payment, as the Trustee may think proper, having first given public notice of the time and place of such sale or sales, by advertisement printed once a week for at least four consecutive weeks in some newspaper printed in the city of Tucson, and no other notice or demand whatsoever to or upon the Transit Company prior to such sale or sales shall be necessary. The Trustee is authorized to adjourn such sale or sales from time to time, in its discretion, giving what it shall deem reasonable notice of the time and place to which the same may be adjourned. The Trustee is hereby further authorized and empowered, either in its own name or the name of the Transit Company, to make, execute, acknowledge and deliver to the purchaser or purchasers at any such sale, good and sufficient deeds of conveyance of the property sold, and any sale made as aforesaid shall be a perpetual bar both

in law and equity against the Transit Company and all persons claiming by, through or under it, from claiming the rights, interests or franchises so sold, or any interest therein, and for the purpose of effecting such conveyance the Trustee is hereby constituted irrevocably the Attorney of the Transit Company. As affecting the title to any property purchased at any such sale, the statement set forth in any affidavit [47] made by the president or vice-president of the Trustee, and appended to the deed of conveyance, relating to the time or manner of giving notice of any default, or to the time and manner of giving notice of such sale, shall not be open to contradiction or dispute by any party or parties, but shall conclusively be deemed to be true. The Trustee or any one or more of the bond-(9) holders or any person in its or their behalf may purchase the property at any sales of the mortgages premises, whether made under the power of sale hereinbefore contained, or pursuant to a judicial decree, and the receipt of the Trustee shall be a sufficient discharge to the purchaser or purchasers for his or their purchase money.

Article IV. The foregoing provision for foreclosure under the power of sale aforesaid is cumulative with the ordinary right of foreclosure by entry, by suit or by action, and that the trustee is hereby empowered to have and exercise such right and all remedies thereto pertaining, against all of the mortgaged property at one time and in one proceeding,

or against portions of it successively and in separate proceedings. And the Transit Company hereby waives any and all rights of stay and redemption now or hereafter provided by the statutes of the Territory of Arizona. If the property to be disposed of in parcels, each person shall take good title notwithstanding that enough may have been already received to satisfy the debt hereunder. The determination of the Trustee to institute foreclosure proceedings by suit or action, instead of by sale under the power aforesaid, shall not be construed as a waiver of the right to immediate possession on default declared or of its rights to the income, revenues and profits of the Transit Company. At any time after default as aforesaid, the Trustee may, if it so desires, be entitled to the appointment of a receiver having such powers and duties and acting under such limitations as the Court making the appointment shall confer and impose. In case the Trustee shall take possession or make sale of the mortgaged premises in pursuance of the provisions hereinbefore contained, all of the keys, books and papers of the Transit Company in any way relating to the mortgaged property or operation or management of the same [48] shall upon request, be delivered by the Transit Company to the Trustee or its agents, and it or they, by itself or themselves, may take possession of such keys, books and papers and hold and use the same, without any hindrance or impediment whatsoever, by or on the part of the

Transit Company or of any person acting or claiming to act by, through or under it. By whatever method of proceedings the mortgage may be foreclosed, the order and method of distributing any proceeds realized on the sale or sales of the property shall be as hereinafter provided. Outstanding bonds and coupons of the issue hereby secured may themselves be used in or toward the payment of the purchase money bid, in lieu of cash, at the net sum distributable thereon.

Article V. Out of the proceeds arising from such sale or sales the Trustee shall first defray the expenses thereof (including its just and lawful charges for services and expenses and a reasonable allowance for attorney or counsel fees), and refund any advances or expenses reasonably incurred by it in operating, maintaining, or managing the property or business of the Transit Company while in possession, and all payments made for taxes, assessments, insurance and other proper charges upon said premises and property, the balance of said proceeds shall be applied and paid as follows: If said balance of such proceeds is sufficient therefor, to the payment of the whole amount of the principal of the bonds and coupons, hereby secured, whether then or thereafter due and payable, and interest thereon up to the time of such payment, together with interest on overdue coupons. If such balance of such proceeds shall be insufficient to pay in full such whole

amount for principal and interest as aforesaid, then the principal and interest of said bonds (10) and overdue coupons, shall be paid, without preference or priority of principal over interest, or interest over principal, or any installment of interest over any other installment of interest, ratably to the aggregate of such principal and unpaid interest, together with interest on overdue coupons. If after payment of the principal of said bonds and all interests as aforesaid, computed to the time of making the payment, any balance of the said proceeds shall remain, the remainder shall [49] be paid over to the Transit Company or its assigns.

Article VI. Before proceeding to take possession of the mortgaged property or to foreclose this deed or mortgage (whether foreclosure be made by sale, under power, or otherwise), the Trustee shall have the right, first to require from the bondholders satisfactory indemnity against the loss and liability that may be incurred by it in so doing, and, upon the tender of such indemnity, by the holder or holders of one-quarter of the bonds at that time outstanding and unpaid, whether such indemnity shall have been previously requested of them or not, it shall be the duty of the Trustee, in case the default of the Transit Company continuing for the space of thirty days after written notice as aforesaid and not waived as hereinafter provided, to take such action, pursuant to the terms, of this deed, as the parties tendering the indemnity may in writing re-

quest. But if any such action shall be requested which the Trustees shall deem inconsistent with the method of procedure specified in a request of other of the bondholders whenever made, the Trustee may adopt whichever method shall to it seem best or pursue such modified course as its counsel advise, keeping always within the terms of this indenture.

Article VII. No delay or omission by the Trustee in exercising the rights and powers herein granted shall be held to exhaust or impair such rights and powers or be construed as a waiver thereof; but it is hereby mutually agreed that the holder or holders of seventy-five per centum in amount of the bonds at the time outstanding, may by instrument in writing, signed and acknowledged by them at any time, whether before or after the institution of the foreclosure proceedings, and upon payment to the Trustee of such expenses as it may have incurred by reason of default, waive or instruct the Trustee to waive any default on the part of the Transit Company, provided, always, that no such action on the part of the bondholders shall extend to or be taken to effect any subsequent default or impair the rights resulting therefrom. The Trustee agrees on any default [50] sixty days continuing in the payment of interest on the said bonds or any other default so continuing, on the written request of the holder of any of said bonds, to give written notice to the Transit Company of such

default under this indenture as the person requesting such notice to be given shall allege to exist. No bondholders or any trustee hereunder shall, under any circumstances, have recourse to any personal or statutory liability against any stockholder, director, or officer of said Transit Company, whether such liability now exists or hereafter accrues; but each such trustee and bondholder shall look for the payment of the bonds and interest thereon solely to the corporate assets and franchises of the Transit Company, it being understood that these assets shall not be construed as embracing any claim which might, under other circumstances, be enforceable either by the creditors of the Transit Company, by a receiver in their behalf, or by the corporation itself, against a stockholder, officer, or director, under any statute now or hereafter in force, or against the stockholders by reason of any alleged insufficiency (11) in the payment for shares of stock.

Article VIII. The Transit Company agrees at any time on request to furnish the Trustee a schedule showing with reasonable detail the items of property covered by the lien hereof, or intended so to be. The Trustee may from time to time release from such lien any of the mortgaged property when, in its judgment, based upon the certificate of some disinterested person selected by the trustee with reasonable care for the purpose of investigating the question, other property of equal value is substi-

tuted therefor, and subjected to the lien hereof, so that such release shall not impair the security of the bondholders, or such property may be released from this mortgage upon the Transit Company making a cash deposit with the Trustee equal in amount to the value of the property to be released, as appraised by such disinterested person and certified by him to the Trustee in writing, and upon such receipt of such deposit, the trustee shall execute and deliver a release of the property in question. The funds so deposited may be used by the Transit [51] Company in the purchase of new or additional property, equipments or materials useful in the business thereof or in carrying out the purpose of its incorporation; and such funds shall be paid to the Transit Company by the Trustee upon a requisition signed by the president and treasurer of the Transit Company, in accordance with a duly certified copy of a resolution of the board of directors of the Transit Company specifying that the amount thereby requested is to be used for such purposes, or if the Transit Company shall prefer, it may use said deposit or any portion thereof, in calling and redeeming outstanding bonds pursuant to the provisions contained in Article X. Property added before the execution of the release may be treated as substituted for the property released, provided the Trustee shall be notified at or before the actual acquisition and possession of the new or additional property that the same is in-

tended as the basis of a future release. All expenses attendant upon such investigation or otherwise upon the securing of such release shall be paid by the Transit Company, and all parties in interest agree that the Trustee shall not suffer or incur any loss or liability in the execution of any such release, or payment of any funds so deposited, if it acts in good faith on the statement and recommendations set forth in a certificate made as above provided. The Transit Company further agrees that it will from time to time make such additions to or repairs on the property, buildings, machinery, railway lines, or other equipment, *connectioned* with the mortgaged plant, as may be required to keep and maintain such plant in first class repair and in condition for performing good and efficient service.

Article IX. The Transit Company hereby expressly covenants and agrees that it will pay any and all taxes, assessments, and governmental charges, assessed or laid upon the mortgaged premises, or any part thereof or interest therein, or upon the Trustee in respect to the same; that it will not suffer any lien superior to the lien hereof to attach to the mortgaged property or any part thereof; that it will preserve and maintain all its franchises and rights now or hereafter [52] possessed by it; that it will conform to all lawful statutes, orders, ordinances, and regulations affecting the corporation, its business and property; and that it will

keep said premises and property at all times insured in such sums as shall reasonably protect the insurable property, and by such insurers as the Trustee may direct, payable in case of loss to the Trustee as its interest may appear, and will, upon proper request therefor, (12) deliver to the Trustee the policies covering said insurance. In case of loss the Trustee shall allow the insurance money received to be applied by the Transit Company toward the renewal or repair of the property destroyed or injured, if the Transit Company so request in writing (provided there be at the time of the application of the money no default, hereunder known to the Trustee), and shall, upon such request, in the absence of such default, pay said money over to the Transit Company for said purpose, on receipt of statements signed and sworn to by the president and treasurer of the Transit Company, accompanied by receipted vouchers to the effect that said property has been replaced or substituted by a repaired or new plant, building, or other property, equal in value to the amount of money to be paid over on said statements and vouchers; but if the Transit Company shall not, within sixty days from the adjustment of the insurance request in writing to have the insurance money so applied, or in case of any default, then existing, known to the Trustee and not made good by the Transit Company on thirty days' written notice then the money shall be invested by the Trus-

tee and form part of the mortgage or trust property, and shall, together with all interest and accumulations thereon, be subject to the provisions of this indenture, in like manner as the other property hereby conveyed, except that the possession of the security shall be held by said Trustee, provided always, that the Trustee shall in any event, if requested in writing by the holders of three-fourths of the outstanding bonds, pay over to the Transit Company the insurance money on receipt of statements and vouchers of the description aforesaid. The Trustee may sell and reinvest the securities at its discretion [53] and may invest in other than so-called chancery securities.

Article X. The Transit Company hereby expressly reserves the right to pay and redeem said bonds or any of them, on any day for payment of semi-annual interest, by paying in gold coin, as aforesaid, for every bond called, the amount of the principal thereof, together with all accrued and unpaid interest thereon, and (if called within ten years from the date hereof), in addition thereto a premium thereon as follows: If called within the first five years from this date, three per cent upon the principal thereof; if within the second five years, two per cent, provided notice thereof is given by the Transit Company to the holder or holders of the called bond or bonds by publication once a week for at least four successive weeks in some news-

paper printed and published in the city of Tucson, Territory of Arizona, and also once a week for at least four consecutive weeks in some daily newspaper printed and published in the City of Denver, Colorado, the first publication of notice in each case to be at least four weeks before the day fixed in said published notice for such redemption, and at such date all interest on the bonds so called shall cease. But all such calls for redemption shall be made through the Trustee and the numbers of the bonds called shall be determined by said Trustee by the casting of lots.

It is further expressly understood and agreed that if, after any bond has been called for the payment in accordance with the foregoing provisions, the same shall not be presented to the Trustee for redemption on or before the day fixed therefor in the published notice, the Transit Company may deposit with the Trustee to the credit of such bond, designated by the number thereof, a sum of money in gold equal to the principal thereof, and in addition thereto the premium hereinabove specified, together with a sum in like gold coin, equal to the (13) interest accrued on the bonds up to date fixed for redemption as aforesaid, and remaining unpaid, which deposit shall be full payment of the bond and coupons belonging thereto as between the Transit Company and the holder thereof. Such deposit in the [54] hands of the Trustee shall draw no interest. Thereupon and thereafterwards, such

bonds and the coupons thereto belonging shall be excluded from participation in the lien and security afforded by these presents and the holder shall look for the payment of the bond and accrued interest only to the sum so deposited in the hands of the Trustee, and in no event to the Transit Company; but said sums so deposited shall be held by the Trustees to the credit of and for the payment of said bonds, and shall be paid by the Trustee to the holder thereof upon the presentation and delivery to it of such bond, together with all the outstanding coupons thereto belonging, and upon the presentation to the Trustee, canceled, of all said authorized issue of bonds and coupons, which at the time shall have been issued and outstanding, or upon presentation of a portion thereof canceled (all of said bonds having been duly called for payment) and the deposit by the Transit Company with the Trustee of a sum of money in such gold coin sufficient, together with all amounts then on deposit, under Article XI, to pay at the rate aforesaid, all of said bonds and interest that are not presented to the Trustee in accordance with the call therefor, the Trustee shall cancel and discharge this mortgage or deed of trust as fully and to the same effect as if the total issue of said bonds and coupons had been duly paid to the Trustee at the maturity thereof. The bonds called and redeemed under this Article X, together with the coupons thereto belong-

ing, shall be forthwith canceled by the Trustee and delivered with the coupons belonging thereto to the Transit Company. It is further expressly understood and agreed that the Trustee, upon written request of the Transit Company, may from time to time advertise for proposals for the sale to it through the Trustee of bonds of this issue by notice printed twice each week for at least two successive weeks in some daily newspaper printed and published in said City of Tucson, and also for a like time in some daily newspaper printed and published in the city of Denver, and that in case proposals for the sale of such bonds at rates not exceeding par value thereof, together with accrued interest and (during the first ten years) the several premiums hereinabove mentioned, [55] shall be received and opened by the Trustee on or before the expiration of the time limited in such notice for the submission of proposals, the Transit Company may purchase all offered bonds or any of them at the rate at which the same are offered (not, however, exceeding the rates hereinbefore mentioned). Payment for and delivery of the original of the purchase bonds shall be made at the office of the Trustee and all the bonds so purchased, together with the coupons belonging thereto, shall be canceled by the Trustee and delivered to the Transit Company.

Article XI. The Transit Company hereby covenants and agrees that after January first, A. D. 1914,

it will apply the net earnings from all of its business and operations in each fiscal year thereafter, ending on December 31st of each year, up to but not exceeding the sum of one thousand dollars for each mile of main road operated, so far as the same may be available after paying or otherwise providing for all its fixed charges, to the sinking fund hereinafter in this Article XI created. If said net earnings in any such fiscal year available for the purpose shall not amount to the sum of one thousand dollars for each mile of main road operated, so much of said amount as shall remain unearned, shall not accumulate. It is expressly (14) understood and agreed by and between the parties hereto, and all persons who shall be or become the owners of any bonds or coupons secured hereby, that the words "net earnings" shall be held to signify the sum remaining of the gross profits, income and receipts of the properties and operations of the Transit Company from all sources during each of its fiscal years (after seven years from this date) after deducting therefrom all the expenses of maintaining, operating, renewing, replacing and repairing its said property and premises, including such reasonable improvements or betterments thereof and additions thereto as shall be deemed by it necessary for the safe, proper, economical and profitable operations of the same, and also after deducting all taxes or assessments imposed or levied upon or

against the Transit Company, its property or business, or the income or earnings thereof, and also deducting the principal and interest [56] of all its indebtedness then accrued other than the principal of its bonded indebtedness. The sinking fund hereby created shall be constituted and applied as follows: On or before February 1st, 1915, and on or before the first day of February each year thereafter, until and including February 1st, 1928, the Transit Company shall furnish to the Trustee a statement of its net earnings during the preceding fiscal year so set apart and applicable to the purposes of this sinking fund and shall pay to the Trustee the sum so set apart and stated. The Trustee shall have the right to inspect the books of the Transit Company by its proper officers or by an expert accountant appointed by the Trustee and paid by the Transit Company for the purpose of verifying or correcting such statement, provided however, a thirty days' notice be given the Transit Company by the Trustee that it desires to make such inspection. If any resulting difference as to said statement shall not be adjusted by agreement between the Transit Company and the Trustee, the Trustee may, and upon being duly indemnified by the holders of a majority of the bonds secured hereby for all costs and expenses to be by it incurred thereby, shall institute proceedings against the Transit Company in a court of equity of com-

petent jurisdiction for an accounting as to the net earnings for the fiscal year covered by said statement available for and applicable to this sinking fund, and in case the final decree therein rendered shall be that the amount of net earnings so available and applicable is in excess of the sum stated, and paid by the Transit Company as aforesaid, the Transit Company shall make good such deficiency within three months from the entry of said final decree, failing which the Transit Company shall upon expiration of said three months, and not until then, be deemed in default as to the said sinking fund payments, within the meaning of this indenture, and the Trustee shall thereupon be authorized to proceed as for a default as hereinbefore provided. The remedy herein provided for ascertaining in case of dispute the amount of net earnings [57] available and applicable for the sinking fund, shall be exclusive of all others, all moneys paid into the sinking fund shall be used to pay off and cancel by one or both of the two methods provided for in the foregoing article, (i. e., by call and redemption at the hereinbefore specified rates and accrued interest, or by purchase pursuant to offers made after advertisement for proposals to sell, or by both such methods), bonds of the issue hereby secured; and the Trustee on its part agrees from time to time, upon receipt of the sums deposited with it for the purpose of such redemption or purchases, to forth-

with advertise for proposals as hereinabove provided for the sale to it of bonds at rates not exceeding those hereinabove specified, and in case bonds shall not be offered at less than said rates, then the Trustee shall forthwith call bonds for redemption and (15) redeem same at specified rates; and all bonds so called and redeemed or purchased under this Article XI, together with the coupons attached, shall be forthwith canceled by said Trustee and delivered to the Transit Company. The provisions of Article X so far as applicable, shall apply to and affect the method of purchasing and redeeming bonds under this Article XI.

Article XII. The Transit Company covenants and agrees to cause this mortgage or deed of trust at all times to be kept recorded, and filed in such manner and such place as may be required by the laws of the state or territory in which the property now or hereafter embraced in this instrument is situated, so as to preserve and protect the security of the bondholders and all rights of the Trustee; and agrees also to execute, acknowledge and deliver to the Trustee and properly record and file a confirmation of this mortgage or indenture, or a renewal thereof, or a new mortgage, when, in such manner, and so often as may be necessary fully to protect the mortgagees' or trustee's title or interest and the security of the bondholders, each such confirmation, renewal or new mortgage to include all property of the Transit Company hereafter acquired,

and a conveyance thereof to be made for the same purposes and on the same trusts as those set forth in this original indenture. And the Transit Company shall and will, from time to time, during the existence [58] of the trust, make, execute, acknowledge and deliver all such further instruments and conveyances as, in the opinion of the legal counsel of the Trustee may be necessary or proper to facilitate the execution of said trust or to further secure said bonds, all of which additional instruments and conveyances the Transit Company agrees to keep properly filed and recorded.

Article XIII. The Transit Company shall and will also at any and all times, upon the written request of the Trustee, furnish to the Trustee upon blanks provided by it for the purpose, a statement in writing, showing accurately the Transit Company's financial condition, including in such statement especially an exhibit of the Transit Company's earnings and operating expenses, given month by month for and during a period of at least a year prior to the time of making such request.

Article XIV. After the delivery of said bonds to the Trustee for certification, the Trustee shall certify the same to an amount not exceeding in the aggregate one hundred and fifty thousand dollars, and shall deliver the same so certified to the Transit Company, or its order, and the said Trustee may without any formality, record, requisition, proof or requirement, return the said bonds to the said

Transit Company, or its officers or agent, from whom the said bonds are received by the said Trustee. After the delivery and certification, however, of bonds to the aggregate amount of one hundred and fifty thousand dollars, no additional bond or bonds shall be certified by the Trustee except upon presentation to him, duly signed by the president (or vice-president) and treasurer of the Transit Company of a certificate to the effect that there has been actually expended for new construction or new equipment at the rate of twelve hundred and fifty dollars for each one thousand dollars of additional bonds so to be certified. And the said Trustee may upon the presentation of such certificate and without any further formality, requisition, proof or requirement, certify and return such additional bond to the officer or agent of the Transit Company from whom they are received. The said Trustee shall in no event be liable or answerable for the use made of [59] any of said bonds after the certification and delivery or return (16) of the same as aforesaid, and the receipt therefor by an officer or agent of said Transit Company shall be full acquittance to the Trustee for certification and delivery, and only such bonds as shall be certified by the said Trustee shall be entitled to the security hereby given.

Article XV. No holder or holders of any of the bonds or coupons hereby secured shall have the right to institute any suit, action or proceedings

at law or in equity for the foreclosure of this mortgage, or the execution of the trust hereof, or for the appointment of a receiver or for the sale of the mortgaged premises, unless the said holder or holders shall have first given notice in writing to the Trustee of default having occurred and continued as aforesaid, and unless a majority in amount of the holders of the bonds then outstanding having made a request in writing to the Trustee therefor and having afforded it a reasonable opportunity to proceed to exercise the powers hereinbefore granted, and having furnished to the Trustee adequate security and indemnity against the costs, expenses and liabilities to be incurred thereby, the Trustee shall have failed or refused to take proceedings as required.

Article XVI. The Trustee shall be entitled to be reimbursed for all proper outlays of whatever sort or nature to be incurred in or about this trust; and to receive a reasonable compensation for any duties which it may at any time perform in the discharge of the same, and all such fees, commissions, compensations and disbursements shall constitute a first lien on the mortgaged property and premises and on all sums in its hands hereunder. It shall be entitled to advice of counsel in all matters concerning the trust and shall be held only to the exercise of reasonable care and diligence in relation to taking possession of, controlling, operating, managing and selling the premises and property

aforesaid, or otherwise carrying out the provisions of this instrument. When the Trustee acts by agents or attorneys it shall not be responsible for their negligence or wrongdoing; but it shall be held to the exercise [60] of reasonable care in selecting, retaining and discharging them. The Trustee shall not be bound to recognize any person or party as the holder of any of said bonds, nor to take any action at his request unless his bond or bonds are submitted to the Trustee for inspection or his ownership thereof is otherwise shown to its satisfaction; and the Trustee may, if it so desires, require the bond or bonds so submitted to be deposited with it and retained until it shall have completed the action requested by such bondholder. Nor shall it, prior to notice of default, continued as aforesaid, be any part of the Trustee's duty to effect insurance against fire or other damage on any portion of the mortgaged property, or to renew any policies of insurance or to keep itself informed or advised as to the performance of any of the Transit Company's covenants, or to the payment, or discharge of any taxes, assessments or liens which may be imposed upon the property, real or personal, sought to be affected by this mortgage, or to require the payment or discharge of such taxes, assessments or liens; but the Trustee shall have the right, in case of neglect by the Transit Company, to attend to any of these matters. No Trustee hereunder shall have any responsibility as

to the validity of this mortgage or as to the execution, acknowledgment, recording or renewal hereof, or as to the amount of adequacy, as security, of the property hereby conveyed. The recitals herein contained are made by the Trust Company solely (17).

Article XVII. It is further agreed that the Trustee may, at any time, resign the trust by written notice delivered, or properly given to the Transit Company, thirty days before the resignation takes effect, and that in case of such resignation or removal or incapacity of the Trustee by reason of insolvency, or other cause, the Transit Company shall have the right to nominate, and appoint a successor to the said office of Trustee, with the consent in writing of the owners of a majority of the bonds hereby secured, at the time outstanding and unpaid. But any vacancy of more than thirty days standing may be filled by any court having jurisdiction on application of the outgoing Trustee or any person interested. No bond shall be required [61] of any trustee, unless ordered by Court for cause shown. Upon the appointment of any successor to the trust by either method above mentioned, all of the mortgaged or trust property shall immediately and without conveyance vest in the new Trustee, but the outgoing trustee shall nevertheless, at the request of any person interested, but at the expense of the Trust and upon payment to it of such amount as may be due it hereunder,

execute, acknowledge and deliver to the new Trustee deeds of conveyance or other instruments in writing as may be appropriate to vest or confirm in the new Trustee the mortgaged or trust property.

Article XVIII. The term "Trustee" as employed in this instrument shall be taken to mean the Trustee hereunder for the time being, whether the said party of the second part or its successor or successors in said trust.

IN WITNESS WHEREOF, said The Tucson Rapid Transit Company has caused its corporate name to be hereunto subscribed by William S. Iliff, its president, and its corporate seal to be attached and attested by Charles K. Durbin, its secretary, and said The International Trust Company has caused its corporate name to be hereunto subscribed by Frank B. Gibson, its vice-president, and its corporate seal to be attached, and attested by S. G. Gill, its secretary, the day and year first hereinbefore written.

THE TUCSON RAPID TRANSIT COMPANY,

By WILLIAM S. ILIFF,
President.

(Corporate Seal)

Attest: CHARLES K. DURBIN,
Secretary.

THE INTERNATIONAL TRUST COM-
PANY,

By FRANK B. GIBSON,
Vice-President.

(Corporate Seal) Attest: S. G. GILL,
Secretary.

State of Colorado,
City and County of Denver,—ss.

On this 19th day of April, A. D. 1906, before me, Allan M. Culver, a notary public within and for the city and county of Denver, and state of Colorado, personally appeared William S. Iliff, the president and Charles K. Durbin, the secretary, of The Tucson [62] Rapid Transit Company, each of whom is to me personally known and known as such officer respectively, and each acknowledged that he executed the foregoing instrument in his respective capacity as president or secretary of the said company as the free act and deed of said company by each of them voluntarily executed, and the said William S. Iliff and Charles K. Durbin, being by me duly sworn, did depose and say each for himself that the seal affixed to the foregoing instrument is the (18) corporate seal of said The Tucson Rapid Transit Company and that said seal was affixed thereto, and the said instrument signed by them, respectively, as president and secretary of the said company by order of the board of directors thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal at Denver, Colorado, the day and year first above written.

My Commission will expire February 28, 1907.

[Notarial Seal] ALLAN M. CULVER,
Notary Public.

State of Colorado,
City and County of Denver,—ss.

On this 19th day of April, A. D. 1906, before me, a notary public within and for the said city and county of Denver, in the state of Colorado, personally appeared Frank B. Gibson and S. G. Gill, who are to me personally known and known to me to be respectively the vice-president and secretary of The International Trust Company, and they acknowledged to me, each for himself, that they executed the foregoing instrument in their respective capacities as vice-president and secretary of the said company, as the free act and deed of said corporation by them, and each of them voluntarily executed, and the said Frank B. Gibson and S. G. Gill being by me duly sworn, did depose and say, each for himself, that the seal affixed to the foregoing instrument is the corporate seal of said The International Trust Company and that said seal was attached thereto and the said instrument signed by them, respectively as [63] vice-president and secretary of the said company by authority of the Board of Directors thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal at Denver, Colorado, the day and year first above written.

My Commission will expire February 28, 1907.

[Notarial Seal] ALLAN M. CULVER,
Notary Public.

State of Arizona,
County of Pima,—ss.

Frank E. Russell, being first duly sworn, deposes and says: That he was, on the 15th day of March, 1906, the general manager of The Tucson Rapid Transit Company, a corporation, and the mortgagor in the above deed of trust, and that continuously to the present time and now has been and is general manager of said company; that the residence and principal place of business of said company was on the 15th day of March, 1906, and continuously, and now is, in the city of Tucson, Pima County, Arizona; that said mortgage attached hereto or deed of trust was at the time of its issuance and execution and now is *bona fide* and was made without any design to defraud or delay creditors.

FRANK E. RUSSELL.

Subscribed and sworn to before me this 27th day of August, A. D. 1918.

[Notarial Seal] G. H. LANGWORTHY,
Notary Public, Pima County.

My commission expires Nov. 19, 1921, Arizona.

State of Colorado,
County of Denver,—ss.

Horace B. Brooks, being first duly sworn, deposes and says: That he is Secretary of The International Trust Company, a corporation organized and existing under and by virtue of the laws of the state of Colorado, and was such at the time of the execution of the attached mortgage or deed of trust executed [64] by The Tucson Rapid Transit Company to The International Trust Company; that the said mortgage or deed of trust was at the time of its execution and now is *bona fide* and made without any design to defraud or delay creditors.

HORACE H. BROOKS,

Subscribed and sworn to before me this 30th day of August, A. D. 1918.

[Notarial Seal]

FRANK G. HARRINGTON.

Notary Public.

My Commission expires Sept. 1st, 1919.

That the said indenture of trust was duly recorded on the 23d day of April, 1906, in the office of the County Recorder of the county of Pima, said State of Arizona, in Book 21 of Mortgages, at page 229; that thereafter and on the 4th day of September, 1918, the said indenture of mortgage was duly filed in the said office of the said County Recorder as a chattel mortgage.

IV.

That as appears from said indenture, and as heretofore set forth herein, certain affidavits as to the good faith of said mortgage were not attached to the said original mortgage as so recorded, but were executed and attached to said mortgage, on or about the 30th day of August, 1918, and were attached at or about the time that the said mortgage was filed as a chattel mortgage, as hereinbefore set forth, and that the said original mortgage, as so executed, delivered and accepted and recorded did not contain said affidavits.

V.

That, as appears from the aforesaid indenture of trust, the same was executed and delivered to secure the principal (20) sum of three hundred thousand dollars (\$300,000.00), together with interest thereon at the rate of six per cent per annum, payable semi-annually, said interest being evidenced by coupons attached to said bonds, and that said bonds were payable twenty-two years from their said date, to wit, on the 15th day of March, 1906. That of the issue of said bonds as provided for in said indenture of trust, there were issued and certified by your complainant as [65] trustee, and at or about or shortly after the execution and delivery and acceptance of said indenture of trust, one hundred fourteen thousand eight hundred dollars (\$114,800.00) of said bonds, and that, as complainant and petitioner is advised, and believes, no other or fur-

ther bonds than the said \$114,800.00, par value, were issued. That the whole of said amount of said bonds, to wit, \$114,800.00, par value thereof, are now outstanding and in the hands of the purchasers thereof or their assignees, are wholly unpaid. That as your petitioner is advised and believes, and upon information and belief avers, of the said interest coupons attached to said bonds and as fully set forth and described in said indenture of trust, there was paid, on or about the 15th day of August, 1906, a portion of said coupons, to wit, the first interest coupon of approximately ninety of said bonds were paid, and that the remainder of the coupons on said installment of interest, and being the first installment of interest, were not paid; that thereafter none of said interest coupons have ever been paid, no interest having been paid whatsoever on said bonds from the date of their issuance up to the present time, except as aforesaid, the interest on approximately ninety of said bonds, and being the first installment of interest due on said bonds. That, as aforesaid, the whole of said interest on said bonds from the date of their issuance, March, 1906, has not been paid in whole or in part, except for part of the said first installment, as aforesaid, and (21) that the whole thereof are now in the hands of the purchasers of said bonds or their assignees, and are wholly unpaid. That, as aforesaid, all of the \$114,800.00 of said bonds, so certified and delivered

as aforesaid, are now in the hands of the purchasers thereof or their assignees, and wholly unpaid.

VI.

That after the execution of said indenture of trust and the due issuance of said bonds aforesaid thereunder, the Morton Trust Company of the city of New York was merged or taken [66] over by the Guaranty Trust Company, of the said City of New York, the said Guaranty Trust Company being the successor of the said Morton Trust Company.

VII.

That on or about the 27th day of August, 1918, the owners and holders of approximately ninety per cent of the said outstanding bonds and interest coupons, presented the said coupons of the said bonds to the said International Trust Company, complainant and petitioner herein, and to the said Guaranty Trust Company of New York, for payment, and did at said time, and at the respective offices as aforesaid of said companies, demand payment of said coupons, which payment was refused; that the amount demanded upon said coupons from the said International Trust Company and the said Guaranty Company at said time, and being all of the coupons attached to said bonds which were due and payable up to the 27th day of August, 1918, save and except always the coupons for the interest on approximately ninety thousand dollars of said bonds, for the first installment of interest thereon as hereinabove set forth, was the sum

of \$70,024.00, and that said interest as represented by said coupons to said amount was then due, owing and unpaid. That none of said interest coupons have been paid, and that no other interest or coupons subsequently maturing have been paid, and the whole thereof are now unpaid, together with the principal of said bonds, as aforesaid. (22)

VIII.

That the said demand was made as aforesaid for the payment of said coupons so not paid, and that default in the payment of said coupons and the whole thereof did continue for more than the space of sixty (60) days after said demand of payment, and that after the expiration of said period of sixty days the Trustee in said indenture of trust and your petitioner did notify the said Tucson Rapid Transit Company of such default and failure to pay said coupons, and that the said Rapid Transit Company after receipt of such notice and for more than the period of thirty (30) days thereafter, did default and continue to [67] default upon the payment of said interest coupons, and as aforesaid, has not paid the same, nor any part thereof.

IX.

That under and by virtue of the aforesaid indenture of trust, the complainant herein, as such trustee, has a first prior and paramount lien to secure the aforesaid indebtedness upon all the property, rights, assets, moneys and all property or property rights of whatsoever kind or description of the said Tucson Rapid Transit Company, which it now has

or may at any time have or possess, and that said complainant under and by virtue of said indenture of trust, has the right to have the funds now in the hands of the Receiver, and all funds that may come into his hands, over and above the necessary expenses of operation and the expenses of said receivership, paid upon the aforesaid indebtedness to it, that complainant has an equitable, first and prior lien upon all funds in the hands of said receiver derived from the operation of said property; and in order to preserve and protect the said property of the said mortgagor, has the right to have any of the property or assets of the said Tucson Rapid Transit Company that may be necessary used for the protection and preservation of said property as a whole or in part. That (23) (substituted May 17, 1920, C. R. McFall, Clerk), complainant is advised that one Asma Rubiaz has filed in this cause a complaint in intervention, wherein she, the said Asma Rubiaz, claims priority on a claim or alleged claim superior to the rights or liens of this complainant. That in fact, the said claim of the said Asma Rubiaz, as this complainant is advised and believes, and on such information, advice and belief avers, is inferior to the liens, rights and claims of the complainant herein.

WHEREFORE, complainant prays judgment:

(1) That the lien or liens of complainant, and under and by virtue of the said indenture of trust, be declared prior and superior to any and all other claims or liens of any person whomsoever upon all of the property, rights, moneys, franchises, profits,

income, and all property of whatsoever kind or description, of the said Tucson Rapid Transit Company, and that all [68] moneys that have been derived from the operation of the property, over and above the necessary expenses of operation and the expenses of the receivership, and that may hereafter be derived from said operation, be paid unto it to apply upon the aforesaid indebtedness, and that the Receiver hold all property of defendants for complainant.

That complainant do have such other and further relief as shall be adequate, and proper and just in the premises.

KINGAN & CAMPBELL,

Attorneys for Complainant and Intervenor.

(Substituted, May 17, 1920. C. R. McFall, Clerk.)

(24)

State of Arizona,

County of Pima,—ss.

S. L. Kingan, being first duly sworn, deposes and says: That he is one of the attorneys for the complainant and intervenor, The International Trust Company; that he has read the above and foregoing petition, and knows the contents thereof, and that the same is true in substance and in fact, to the best of his knowledge and belief; that affiant makes this affidavit for and on behalf of the said complainant and intervenor, The International Trust Company, for the reason that the said company and its offices are without the State of Arizona.

S. L. KINGAN.

Subscribed and sworn to before me this 26th day of April, 1920.

[Notarial Seal]

G. H. LANGWORTHY,

Notary Public.

My commission expires Nov. 19, 1921. (24)

[Endorsed]: No. ——. In the United States District Court in and for the District of Arizona. Tucson Gas, Electric Light & Power Company, a Corporation, Plaintiff, v. Tucson Rapid Transit Company, a Corporation, Defendant, and Asma Rubiaz and The International Trust Company, a Corporation, Intervenor. Petition and Complaint in Intervention. Service admitted the 26th day of April, 1920. Richey & Richey, Moore & Frawley, Attys. for Asma Rubiaz, Intervenor. Edwin F. Jones, Receiver. Filed Apr. 26, 1920. C. R. McFall, Clerk. [69]

In the District Court of the United States in and for the District of Arizona.

E.—70.

THE TUCSON GAS, ELECTRIC LIGHT &
POWER COMPANY, a Corporation,
Plaintiff,

vs.

THE TUCSON RAPID TRANSIT COMPANY, a
Corporation,

Defendant,

and

ASMA RUBIAZ,

Intervenor.

Answer of the Tucson Gas, Electric Light & Power Company to the Complaint of Asma Rubiaz.

Comes now the plaintiff, The Tucson Gas, Electric Light & Power Company, ans answering the complaint of Asma Rubiaz, Intervenor, says:

I.

Plaintiff denies that by reason of Section 3634 of the Civil Code of the State of Arizona, 1913, or at all, the judgment obtained by the intervenor is a first lien on the personal property or any of the property of The Tucson Rapid Transit Company, and denies that such alleged lien is entitled to be foreclosed, and denies that the amount due on the aforesaid judgment should be paid by said receiver prior to any other claim mentioned in the petition or complaint of plaintiff herein, and in this behalf, plaintiff avers that the said judgment, so obtained, is not a first lien upon any of the property of the defendant, The Tucson Rapid Transit Company, and avers that, on the 15th day of March, 1906, the said Tucson Rapid Transit Company executed a deed of trust to the International Trust Company, and did deed and mortgage to said trustee, at said time, all of its property, real, personal and mixed, that it then had or might thereafter acquire or become possessed of; that said deed of trust was executed to secure the payment of certain bonds about to be issued, together with the interest upon the same; that (1) under and pursuant to the terms of said deed of trust, there was issued one hundred fourteen thousand eight hundred dollars [70]

(\$114,800.00) of said bonds, and that no other or further bonds were issued under said deed of trust; that the whole of said amount of bonds remains unpaid, and is now due and payable, as plaintiff is advised and believes; that none of the interest upon said bonds has been paid, save and except that plaintiff is advised, and on such information and belief avers, that the first installment of interest on ninety thousand dollars (\$90,000.00) of said bonds was paid, and that none of said interest, other than the said single payment of interest on approximately ninety thousand dollars of said bonds has been paid, and that the whole of said interest, with the exception aforesaid, is now due, owing and unpaid, and that said interest, now accrued and unpaid, amounts to upwards of the sum of, be it more or less, seventy-three thousand dollars (\$73,000.00); that the lien of said deed of trust is a first, prior and paramount lien upon all of the property, real, personal and mixed, money, franchises and all assets whatsoever, of the said The Tucson Rapid Transit Company, and is prior and superior to, upon the whole of the property of the said The Tucson Rapid Transit Company, the lien claimed by the intervenor herein. Further in this behalf, plaintiff avers that all of the money now in the hands of the receiver consists of earnings of the said Tucson Rapid Transit Company, during and within the period after said receiver was appointed, and that the said intervenor has no lien upon said money or any thereof; plaintiff denies that the sum of money now in the hands of the Receiver of the

Tucson Rapid Transit Company is not essential or necessary for the operation or management and expenses of the property of the Tucson Rapid Transit Company, and in this behalf avers that the franchise of the City of Tucson granted to the Tucson Rapid Transit Company requires said company, whenever (2) paving shall be ordered upon a street where the railroad of said company shall be operated, that said company shall pave between the rails on said street or streets, and that, in the event it shall fail so to do, its franchise shall be forfeited; that the City of Tucson has ordered that Stone Avenue, in the said City of Tucson from the railroad tracks of the Southern Pacific Company on said Stone Avenue, north to Third Street shall be paved, and that, as plaintiff is advised and believes, the contract [71] for the paving of said street has been let, and said paving is about to be commenced; that the said Tucson Rapid Transit Company and its receiver will be required, in order to protect the franchise of the said company, to pave between the rails of said railway, said portion of said street about to be paved; that the cost of said paving to be paid by the Tucson Rapid Transit Company will be, as plaintiff is informed and believes, approximately the sum of eight thousand dollars (\$8,000.00); that it is essential that the said receiver pave said portion of said street in order to protect the bonds of the said Tucson Rapid Transit Company, and preserve the said franchise from forfeiture; that, should the receiver of The Tucson Rapid Transit Company, for any reason, fail or refuse, or

be unable for lack of funds, to pave said street, and said franchise be forfeited, as under said franchise it may be forfeited, the assets of the said Tucson Rapid Transit Company will be practically destroyed, in that the said company's assets, which largely consist of its right to operate upon the streets of the City of Tucson, will be lost, and the creditors of the said Tucson Rapid Transit Company will be deprived of payment of their just claims; that the creditors of the said Tucson Rapid Transit Company have the right to have any and all funds now in the hands of the said receiver and earned by the said receiver from the operation of said property used for the preservation (3) and protection of said property, to the end that their security be not destroyed by forfeiture of the franchise of the said defendant company.

II.

Further answering, said plaintiff denies as aforesaid, that the judgment of the said intervenor is a first and prior lien on the personal property, or any of the property of the said Tucson Rapid Transit Company, including the sum of money in the hands of the said receiver, and as aforesaid, avers that the lien of the said deed of trust is the first and prior lien upon all of the property and assets of whatsoever kind or character of the said Tucson Rapid Transit Company.

WHEREFORE, plaintiff prays that the intervenor do have [72] and recover nothing upon her complaint and petition in intervention; that the lien of the said International Trust Company be declared

the first and paramount lien upon all of the property and assets of the Tucson Rapid Transit Company; that, to the end that the creditors of The Tucson Rapid Transit Company may have their rights preserved in said property, that the receiver herein be authorized and directed to apply the moneys now in its hands to the necessary paving of, the aforesaid street that the franchise of the Tucson Rapid Transit Company be not forfeited and its assets preserved, and for such other and further relief as to the Court may seem meet and equitable in the premises.

KINGAN & CAMPBELL,
Attorneys for Plaintiff. (4)

State of Arizona,
County of Pima,—ss.

Frank E. Russell, being first duly sworn, deposes and says: That he is the general manager of the plaintiff herein; that he has read the above and foregoing answer and knows the contents thereof, and that the same is true in substance and in fact, except as to those matters stated upon information and belief, and as to those that he believes it to be true.

FRANK E. RUSSELL.

Subscribed and sworn to before me this 28th day of April, 1920.

[Notarial Seal] G. H. LANGWORTHY,
Notary Public.

My commission expires Nov. 19, 1921. (5)

[Endorsed]: No. E.—70. In the District Court of the United States in and for the District of Arizona.

The Tucson Gas, Electric Light & Power Company, a Corporation, Plaintiff, vs. The Tucson Rapid Transit Company, a Corporation, Defendant, and Asma Rubiaz, Intervenor. Answer of The Tucson Gas, Electric Light & Power Company to the Complaint of Asma Rubiaz, Intervenor. Service admitted [73] this 28th day of April, 1920. Edwin F. Jones, Receiver. Moore & Frawley, Richey & Richey, Attys. for Intervenor. Geo. O. Hilzinger, Atty. for Deft. Filed Apr. 28, 1920. C. R. McFall, Clerk. By J. Lee Baker, Chief Deputy Clerk. [74]

In the District Court of the United States, in and
for the District of Arizona.

TUCSON GAS, ELECTRIC LIGHT AND POWER
COMPANY, a Corporation,

Plaintiff,

vs.

TUCSON RAPID TRANSIT COMPANY, a Corporation,

Defendant.

Answer of Receiver to Petition.

Comes now Edwin F. Jones, Receiver of the Tucson Rapid Transit Company, and for answer to said petition says:

I.

That he is not informed upon what date said Asma Rubaiz instituted suit in the Superior Court, nor is he informed as to the date upon which said judgment was entered.

II.

Receiver admits that since his appointment as such Receiver he has joined in an appeal by the Tucson Rapid Transit Company against the said judgment, and that said judgment has been duly affirmed by the Supreme Court of the State of Arizona.

III.

This Receiver admits that he now has on hand, as such Receiver, and on deposit in the Arizona National Bank in the City of Tucson, the sum of \$8,368.77, which said sum is derived from the operation of the property of the Tucson Rapid Transit Company under the orders of this Court.

IV.

This Receiver is not advised, and does not deem it his duty or privilege to decide whether the said judgment is a lien upon any of the property in his hands as such Receiver, or to what extent the same is a lien, and he submits to the Court that he is entitled to instructions from the Court in the matter, and he asks that the Court will herein determine whether or not any of the money in his hands is subject to said lien, and whether the same should be paid by him upon said judgment, and he asks the direction of the Court in that regard.

Respectfully submitted,

EDWIN F. JONES,

Receiver, Tucson Rapid Transit Company, a Corporation. [75]

State of Arizona,
County of Pima,—ss.

Edwin F. Jones, being first duly sworn, on oath says: that he is the Receiver of the Tucson *Rapid Company*, and that the facts stated in the above answer when made on his own knowledge are true, and those made on information and belief, he verily believes to be true.

EDWIN F. JONES.

Sworn to and subscribed before me this second day of April, 1920.

[Seal]

MAUDE I. BOWEN,

Notary Public.

My commission will expire September 26, 1920.

[Endorsement]: E.—70. In the District Court of the United States, in and for the District of Arizona. Tucson Gas, Electric Light & Power Company, a Corporation, Plaintiff, vs. Tucson Rapid Transit Company, a Corporation, Defendant. Answer of Receiver to Petition. Filed Apr. 19, 1920. C. R. McFall, Clerk. [76]

In the District Court of the United States, in and
for the District of Arizona.

TUCSON GAS, ELECTRIC LIGHT & POWER
COMPANY, a Corporation,
Plaintiff,

vs.

TUCSON RAPID TRANSIT COMPANY, a Corpo-
ration,
Defendant,

and

ASMA RUBIAZ, and THE INTERNATIONAL
TRUST COMPANY, a Corporation,
Intervenors.

**Answer of Receiver to Complaint of International
Trust Company in Intervention.**

Comes now the Receiver and for answer to the
complaint in intervention heretofore filed against
him in this cause, and admits, denies and alleges
as follows:

I.

He admits the allegations of paragraph one of
said complaint.

II.

He admits the allegations of paragraph two of
said complaint.

III.

He admits the allegations of paragraph three of
said complaint.

IV.

Receiver is not informed as to the matters and

things alleged in the fourth paragraph of said complaint, and he neither admits nor denies the same, but demands strict proof thereof.

V.

As to paragraph five of said complaint, this Receiver says that he is not informed as to the legal effect of said mortgage, and does not deem it either his province or privilege to determine the rights of the various parties thereunder, and submits the matter to the Court for its decision, and asks that he be instructed as to his duty in the premises.

VI.

This Receiver is ignorant of the matters and things [77] alleged in the sixth and seventh paragraphs of said complaint, and neither admits, nor denies the same, but demands strict proof thereof.

VII.

As to the matters and things alleged in paragraph nine of said answer, this Receiver states that he is not informed as to the priority of payment claimed by said Asma Rubiaz under said judgment, and he states that the money in his hands was derived from the operation of the property covered by said mortgage, and is the entire proceeds of the operation after paying the actual expenses of maintaining and operating said railroad. That the money is deposited in his name as Receiver in the Arizona National Bank, there being now on deposit to his credit the sum of Eight Thousand Three Hundred Sixty-eight Dollars and Seventy-seven Cents (\$8,368.77). This Receiver alleges that the

City of Tucson has heretofore by proper ordinance, required the paving of Stone Avenue from the crossing of the Southern Pacific to Third Street, which will necessitate the paving of the roadbed and one foot on each side of the rails over said distance; that the contract for paving has been let by said city, and will soon be executed; that the paving of the railroad should be done at the same time; that the estimated cost of said paving is the sum of Ten Thousand Dollars (\$10,000.00); that under and by virtue of the franchise under which the Tucson Rapid Transit Company is operated, the City of Tucson has the right, at its option, to declare said franchise forfeited if the paving above set out is not done. This Receiver shows to the Court that he has no means of paving said roadbed than the money now in his hands, and submits that the said paving is necessary for the protection of said franchise, and for the protection and the security of said mortgage. (2) He submits to the Court the question whether or not the said money now in his hands as Receiver, or any thereof, should be used in the paving of said roadbed, and asks for directions of the Court in that regard.

VIII.

This Receiver informs the Court that said Asma Rubiaz [78] claims that her judgment is a prior and first lien upon the money in his hands, and said International Trust Company, on the contrary, claims that the said money in the hands of the

Receiver should be applied to the past due interest on their said mortgage, and he asks that the said Asma Rubiaz and the said International Trust Company, and all other parties in interest, be required to propound their claims in your Honorable Court, and that the Court determine all the respective rights and priorities of the parties to the moneys now in the hands of the Receiver, and this Receiver prays for such other, further and different relief, and for all such other, further and different orders as may be necessary to protect him in the discharge of his duties as such Receiver.

And having fully answered this petition, this Receiver prays to be hence dismissed.

EDWIN F. JONES,

Receiver. (3)

[Endorsed]: E.—70. In the District Court of the United States, in and for the District of Arizona. Tucson Gas, Electric Light and Power Company, a Corporation, Plaintiff, vs. Tucson Rapid Transit Company, a Corporation, Defendant, and Asma Rubiaz and the International Trust Company, a Corporation, Intervenors. Answer of Receiver to Complaint of International Trust Company, in Intervention. Filed Apr. 29, 1920. C. R. McFall, Clerk. Edwin F. Jones, Receiver. [79]

In the District Court of the United States, in and
for the District of Arizona.

E.—70.

TUCSON GAS, ELECTRIC LIGHT AND
POWER COMPANY, a Corporation,
Plaintiff,

vs.

TUCSON RAPID TRANSIT COMPANY, a Cor-
poration,

Defendant,

and

ASMA RUBIAZ,

Intervenor.

**Answer of Tucson Rapid Transit Company to Com-
plaint in Intervention.**

Comes now Tucson Rapid Transit Company, a corporation, the defendant herein, and for answer to the complaint in intervention filed by said Asma Rubiaz, admits, alleges and denies as follows:

Admits that on or about the 10th day of January, 1918, and prior to this Honorable Court placing the property of this defendant into the control and possession of the Receiver, Edwin F. Jones, the said Asma Rubiaz instituted a suit in the Superior Court of the State of Arizona, in and for the County of Pima, on a claim of damages for personal injuries negligently inflicted on her by the said defendant.

Admits that thereafter on or about the 25th day of June 1918, and prior to the appointment of said Receiver, that said Asma Rubiaz recovered judgment in said Superior Court for the sum of Forty-five Hundred Dollars (\$4,500.00) and Fifty-two and Seventy-five Hundredths Dollars (\$52.75) costs, as more fully set out in Exhibit "A" of said Intervenor's petition.

Admits that thereafter the defendant and said Receiver appealed from said judgment to the Supreme Court of the State of Arizona, and that on or about the 2d day of February, 1920, said Supreme Court rendered its judgment affirming the said judgment of said Superior Court, and that thereafter on or about the 18th day of February, 1920, said Supreme Court issued its mandate and forwarded same to said Superior Court as more fully set forth in Exhibit "B" of said Intervenor's petition. [80]

Admits that no part or portion of said judgment has been paid, and admits that the same remains wholly unsatisfied, and denies that said judgment is a first lien on the property, personal or otherwise, of this defendant, and denies that said lien of judgment is entitled to be foreclosed and paid by the said Receiver prior to any other claim mentioned in plaintiff's bill of complaint.

Admits that the Receiver, Edwin F. Jones, has now in his hands as current receipts as the result

of managing and operating the properties of this defendant, amounting as it is informed and believes, to about Eight Thousand Dollars (\$8,000.00), but denies that the same is not essential or necessary for the operation and management expense of the property of the defendant, as herein-after more fully set forth.

Admits that said Intervenor has demanded payment of said judgment, and that payment has been refused, and that there is now unpaid on said judgment the sum of Forty-five Hundred Fifty-two and Seventy-five Hundredths Dollars (\$4,552.75), with interest thereon from the 25th day of June, 1918, at the rate of six (6) per cent per annum, and the further sum of One Hundred Six Dollars (\$106.00) costs in said Supreme Court, together with interest thereon from the second day of February, 1920, at the rate of six (6) per cent per annum.

Denies that the said judgment of Intervenor, Asma Rubiaz, is a first and prior lien on the personal property of defendant, within the County of Pima, State of Arizona, including said sum of money in the hands of said Receiver, and in this connection alleges:

I.

That on or about the 15th day of March, 1906, this defendant executed and delivered a certain indenture and deed of trust to the International Trust Company, a corporation, organized and (2)

existing under the laws of the State of Colorado, and having its principal place of business in the City of Denver in said State, and did mortgage to said Trust Company at said time all of its property, real and personal and mixed, that it then [81] had or might thereafter acquire, or become possessed of; that said deed of trust was executed to secure the payment of certain bonds about to be issued by defendant in the aggregate principal sum of Three Hundred Thousand Dollars (\$300,000), together with interest thereon at the rate of six (6) per cent per annum, payable semi-annually, and evidenced by coupons to be attached to said bonds, and that said bonds were payable twenty-two (22) years from their said date, to wit, the 15th day of March, 1906; that it was provided in said deed of trust that bonds thereunder in the aggregate amount of One Hundred Fifty Thousand Dollars (\$150,000) should be at once issued and certified; that the remainder should be issued and certified only after expenditures for new construction or new equipment all as provided in said deed of trust; that said instrument was executed on or about the 15th day of March, 1906, and on or about the 23d day of April, 1906, was duly recorded in the office of the County Recorder of Pima County, Arizona, in Book 21 of Mortgages, at page 229; that under said deed of trust, and out of the One Hundred Fifty Thousand Dollars (\$150,000) of bonds therein provided to be issued forthwith,

there were issued or certified and disposed of by said defendant, bonds aggregating the total amount of One Hundred Fourteen Thousand Eight Hundred (\$114,800.00); that since the year 1910 the defendant has not paid any interest upon said bonds, and that the whole of said interest from and after the year 1910 up to the present time is now unpaid and is due and owing unto the holders of said bonds, and that said interest now accrued, due, owing and unpaid amounts to upwards the sum of Seventy-five Thousand Dollars (\$75,000.00), payment of which has heretofore been demanded. (3)

II.

That for many years last past prior to the appointment of the Receiver herein the said defendant in the operation of said street railway line has been unable to earn its interest and operating charges, and has been insolvent. [82]

III.

That on or about the fourth day of September, 1918, the said deed of trust was duly filed in the office of said County Recorder of Pima County as a chattel mortgage.

IV.

That as appears from said indenture certain affidavits as to the good faith of said mortgage were not attached to the said original mortgage as so recorded, but were executed and attached to said mortgage on or about the 30th day of August, 1918, and were attached at or about the time that said

indenture was filed as a *chattle* mortgage, and that said original mortgage as executed, delivered and accepted, did not contain said affidavits.

V.

That the whole of said amount of said bonds, to wit, \$114,800 par value thereof, are now outstanding and in the hands of purchasers thereof, or their assignees, and wholly unpaid. That defendant avers, of the said interest coupons attached to said bonds there was paid, on or about the 15th day of August, 1906, a portion of said coupons, to wit, the first interest coupon, of approximately ninety of said bonds were paid, and that the remainder of the coupons on said installment of interest, and being the first installment of interest, were not paid; that thereafter none of said interest coupons have ever been paid, no interest having been paid whatsoever on said bonds from the date of their issuance up to the present time, except as aforesaid, the interest on approximately ninety of said bonds, and being the first installment of interest due on said bonds, that (4) as aforesaid, the whole of said interest on said bonds from the date of their issuance, March, 1906, has not been paid in whole or in part, except for part of the said installment, as aforesaid, and that the whole thereof are now in the hands of the purchasers of said bonds or their assignees, and are wholly unpaid. That, as aforesaid, all of the \$114,800.00 of said bonds, so certified and delivered as aforesaid, are

now in the hands of the purchasers thereof or their assignees, and wholly unpaid. [83]

VI.

That after the execution of said indenture of trust and the due issuance of said bonds aforesaid thereunder, the Morton Trust Company of the city of New York, Trustee, was merged or taken over by the Guaranty Trust Company, of the said City of New York, the said Guaranty Trust Company being the successor of the said Morton Trust Company.

VII.

That on or about the 27th day of August, 1918, the owners and holders of approximately ninety per cent of the said outstanding bonds and interest coupons, presented the said coupons of the said bonds to the said International Trust Company, and to said Guaranty Trust Company of New York, for payment, and did at said time, and at the respective offices as aforesaid of said companies, demand payment of said company, which payment was refused; that the amount demanded upon said coupons from the said International Trust Company and the said Guaranty Company at said time, and being all of the coupons attached to said bonds which were due and payable up to the 27th day of August, 1918, save and except always the coupons for the interest on approximately ninety thousand dollars of said bonds, for the first installment of interest thereon as hereinabove set forth, was the

sum of \$70,024.00, and that said interest as represented by said coupons to said amount was then due, owing and unpaid. That none of said interest coupons have been paid, and that no other in- (5) terest or coupons subsequently maturing have been paid, and the whole thereof are now unpaid, together with the principal of said bonds, as aforesaid.

VIII.

That the said demand was made as aforesaid for the payment of said coupons so not paid, and that default in the payment of said coupons and the whole thereof did continue for more than the space of sixty (60) days after said demand of payment, and that after the expiration of said period of sixty days the Trustee in said indenture of trust did notify the said Tucson Rapid Transit Company of such default and failure to pay said [84] coupons and that the said Rapid Transit Company after receipt of such notice and for more than the period of thirty (30) days thereafter did default and continue to default upon the payments of said interest coupons, and, as aforesaid, has not paid the same *not* any part thereof.

IX.

That under and by virtue of the aforesaid indenture of trust, the International Trust Company, as such trustee, has a first, prior and paramount lien to secure the aforesaid indebtedness upon all the property, rights, assets, moneys and all property

or property rights of whatsoever kind or description of the said Tucson Rapid Transit Company, which it now has or may at any time have or possess, and that said Trustee, under and by virtue of said indenture of trust, has the right, in order to preserve and protect the said property of the mortgagor, to have any of the property or assets of the said Tucson Rapid Transit Company that may be necessary used for the protection and preservation of said property as a whole or in part. That in fact the said claim of the said Asma Rubiaz as this defendant is advised and believes, and on such information, advice and belief avers, is inferior and secondary to the liens, rights and claims of the said Trustees. (6)

X.

That the city of Tucson, a municipal corporation, has heretofore by proper ordinance, required the paving of Stone Avenue from the crossing of the Southern Pacific Railroad tracks to Third Street in said city where defendant carries on its business as a public service corporation, running a street car line, which will necessitate the paving of the road-bed and one foot on each side of the rails over said distance; alleges that the contract for paving has been let by said city, and will soon be executed, and that the paving of the railroad should be done at the same time; alleges that estimated cost of said paving is about Ten Thousand Dollars (\$10,000), and that under and by virtue of the franchise under which the Tucson Rapid Transit Company

is operated, said City of Tucson has the right, at its [85] option, to declare said franchise forfeited if the paving above set out is not done; defendant alleges that it has no other means of paving said roadbed than the money now in the hands of the Receiver, and alleges that the said paving is necessary for the protection of said franchise, and for the protection and security of said mortgage.

WHEREFORE, defendant prays:

1. That the lien or liens of the International Trust Company, Trustee, under and by virtue of the said indenture of trust, be declared prior and superior to any and all other claims or liens of any person, and of the claim or lien of the said Asma Rubiaz upon all property, property rights, moneys, franchises, and all properties of whatsoever kind and description of the said defendant.

2. That the Court direct the money now in the hands of the Receiver to be spent for the purpose of doing said paving in order to improve the security of the said trustee.

GEORGE O. HILZINGER,
Attorney for Defendant. (7)

State of Arizona,
County of Pima,—ss.

Walter J. Bartlett, being first duly sworn, deposes and says that he is the auditor of the Tucson Rapid Transit Company, a corporation; that he has read the above and foregoing answer, and knows the contents thereof, and that the same is true in sub-

stance and in fact, to the best of his knowledge and belief, and that he makes this affidavit for and on behalf of the defendant corporation, and as such officer.

WALTER J. BARTLETT.

Subscribed and sworn to before me this 30th day of April, 1920.

[Seal]

MAUDE I. BOWEN,

Notary Public.

My commission will expire Sept. 26, 1920. (8)

[Endorsed]: In the District Court of the United States in and for the District of Arizona. Tucson Gas, Electric Light and Power Company, a Corporation, Plaintiff, vs. Tucson Rapid Transit Company, a Corporation, Defendant, and Asma Rubiaz, Intervenor. Answer of Tucson Rapid Transit Company to Asma Rubiaz, Intervenor. E.-70. Service of copy of within answer acknowledged this 30th day of April, 1920. Moore & Frawley and Richey & Richey, Attys. for Asma Rubiaz. Filed Apr. 30, 1920. C. R. McFall, Clerk. By J. Lee Baker, Chief Deputy Clerk. [86]

In the District Court of the United States in and
for the District of Arizona.

TUCSON GAS, ELECTRIC LIGHT & POWER
COMPANY, a Corporation,

Plaintiff,

vs.

TUCSON RAPID TRANSIT COMPANY, a Cor-
poration,

Defendant,

and

ASMA RUBAIZ and THE INTERNATIONAL
TRUST COMPANY, a Corporation,

Intervenors.

Notice of Motions.

To THE TUCSON GAS, ELECTRIC LIGHT &
POWER COMPANY, and Messrs. KINGAN
& CAMPBELL, Its Attorneys.

To TUCSON RAPID TRANSIT COMPANY and
GEORGE O. HILZINGER, Its Attorney.

To THE INTERNATIONAL TRUST COMPANY,
and Messrs. KINGAN & CAMPBELL, Its
Attorneys, and

To EDWIN F. JONES, Receiver, Tucson, Arizona.

You and each of you will please take notice that
Intervenor Asma Rubaiz will on Monday, the 17th
day of May, 1920, at 10 o'clock A. M. of said day,

or as soon thereafter as counsel can be heard, at the courtroom of the above-entitled court in the city of Tucson, County of Pima, State of Arizona, before Hon. William H. Sawtelle, Judge of said above-entitled court, present to said Court her motions as follows, to wit: (1)

Motion to dismiss the complaint in intervention of The International Trust Company, Intervenor above named;

Motion to strike out the answer of the Tucson Gas, Electric Light & Power Company, plaintiff above named, to the complaint in Intervention of the said Asma Rubaiz; and

Motion to strike out the answer of Tucson Rapid Transit Company, defendant above named, to the complaint in Intervention of the said Asma Rubiaz, copies of each of which said motions are hereto attached, and move the Court for an order dismissing said complaint in Intervention of said The International Trust Company, as to Intervenor, Asma Rubaiz; for an order striking out the answer of Tucson Rapid Transit Company to the complaint [87] in intervention of the said Asma Rubaiz as to Intervenor Asma Rubaiz and for an order striking out the answer of the Tucson Gas, Electric Light & Power Company, to the complaint in intervention of the said Asma Rubaiz, as to Intervenor Asma Rubaiz, each and all for want of equity and for failure to state any facts or grounds sufficient to entitle the said The International Trust Company to any priority or superiority of its lien over the lien of

the said Asma Rubaiz, on the money and other personal property of Tucson Rapid Transit Company now in the hands of the Receiver, and for an order or orders for such other and further relief in the premises as may be just and equitable; and will in the presentation of said motions direct the Court's attention to the apparent collusion of plaintiff, defendant and intervenor, The International Trust Company, to keep the moneys and other personal property of The Tucson Rapid Transit Company now in the hands of the Receiver from the said intervenor, Asma Rubaiz, and to apply said money and other personal property to the enhancement and improvement of the security of the mortgage of said The International Trust Company alone.

(2)

You will further please take notice that Intervenor Asma Rubaiz hereby specifies the following as the documents to be used by her in support of said Motions and each of them, to wit:

The complaint of plaintiff;

The answer of defendant;

The complaint in intervention of Asma Rubaiz;

The answer of Tucson Rapid Transit Company to the complaint in intervention of Asma Rubaiz;

The answer of the Tucson Gas, Electric Light & Power Company to the complaint in intervention of Asma Rubaiz;

The complaint in intervention of the International Trust Company;

The answer of the Receiver to the complaint in intervention of Asma Rubaiz;

The answer of the Receiver to the complaint in intervention of the International Trust Company; [88]

The various reports of the Receiver to the Court; and

The order of the Court appointing the Receiver; —all being the pleadings, papers, documents and reports in the above-entitled suit.

Dated, Tucson, Arizona, May 10th, 1920.

MOORE & FRAWLEY,
RICHEY & RICHEY,

Attorneys for Intervenor, Asma Rubaiz. (3)

[Endorsed]: E.-70. In the District Court of the United States, in and for the District of Arizona. Tucson Gas, Electric Light & Power Company, a Corporation, Plaintiff, vs. Tucson Rapid Transit Company, a Corporation, Defendant, and Asma Rubaiz and The International Trust Company, a Corporation, Intervenors. Notice of Motions. Filed May 11, 1920, C. R. McFall, Clerk. By J. Lee Baker, Chief Deputy Clerk. Richey & Richey, Attorneys for Intervenor Asma Rubaiz. [89]

In the District Court of the United States, in and
for the District of Arizona.

TUCSON GAS, ELECTRIC LIGHT & POWER
COMPANY, a Corporation,

Plaintiff,

vs.

TUCSON RAPID TRANSIT COMPANY, a Cor-
poration,

Defendant,

and

ASMA RUBAIZ and THE INTERNATIONAL
TRUST COMPANY, a Corporation,

Intervenors.

Acknowledgment of Service of Motions.

Received copies of each of the following motions,
to wit: Motion of Intervenor Asma Rubaiz to dis-
miss complaint of The International Trust Com-
pany; motion of Intervenor Asma Rubaiz to strike
out answer of Tucson Rapid Transit Company to
her complaint in intervention; motion of Intervenor
Asma Rubaiz to strike out answer of the Tucson
Gas, Electric Light & Power Company to her com-
plaint in intervention; this 10th day of May, 1920,
and notice that they will be called for hearing on
Monday, May 17th, 1920, at the hour of 10 o'clock

A. M. of said day, or as soon thereafter as same may be heard.

TUCSON GAS, ELECTRIC LIGHT &
POWER COMPANY,

By KINGAN & CAMPBELL,

Its Attorneys.

TUCSON RAPID TRANSIT COMPANY,

By GEO. O. HILZINGER,

Its Attorney.

THE INTERNATIONAL TRUST COM-
PANY,

By KINGAN & CAMPBELL,

Its Attorneys.

EDWIN F. JONES,

Receiver.

[Endorsed]: E.-70. In the District Court of the United States, in and for the District of Arizona. Tucson Gas. Electric Light & Power Company, a Corporation, Plaintiff, vs. Tucson Rapid Transit Company, a Corporation, Defendant, and Asma Rubaiz and The International Trust Company, a Corporation, Intervenors. Acknowledgment of Service. Filed May 11, 1920. C. R. McFall, Clerk. By J. Lee Baker, Chief Deputy Clerk. [90]

In the District Court of the United States, in and
for the District of Arizona.

TUCSON GAS, ELECTRIC LIGHT & POWER
COMPANY, a Corporation,

Plaintiff,

vs.

TUCSON RAPID TRANSIT COMPANY, a Cor-
poration,

Defendant,

and

ASMA RUBAIZ and THE INTERNATIONAL
TRUST COMPANY, a Corporation,

Intervenors.

**Motion of Intervenor Asma Rubaiz to Dismiss Com-
plaint of the International Trust Company.**

Now comes Intervenor Asma Rubaiz and makes
and files this her motion to dismiss the complaint
of The International Trust Company, intervenor
in the above-entitled cause, for reasons as follows:

1. Because said complaint does not state facts
or grounds sufficient to constitute or entitle said
The International Trust Company to a valid or any
priority or superiority of its mortgage lien over the
judgment lien of your petitioner on the money or
other personal property of the Tucson Rapid
Transit Company, defendant above named, now in
the hands of the Receiver in this action.

2. Because said complaint does not state any facts or grounds sufficient to entitle said The International Trust Company to any equitable relief whatever as against or involving the money or other personal property of the Tucson Rapid Transit Company, defendant herein, now in the hands of the Receiver herein as against the lien of Intervenor Asma Rubaiz. (1)

3. Because said complaint shows on its face that said The International Trust Company is seeking the sole relief "to have any of the property or assets of the said Tucson Rapid Transit Company that may be necessary used for the protection and preservation of said property as a whole or in part," to secure the indebtedness under its mortgage, and not the relief of payment or the application of money in the hands of the Receiver or current income or the proceeds of foreclosure and sale of the property of Tucson Rapid Transit Company in the hands [91] of the Receiver, to the claim of said The International Trust Company.

WHEREFORE, your petitioner prays that said complaint of The International Trust Company be dismissed as to Intervenor Asma Rubaiz, and for such other and further relief in the premises as may be just and equitable.

MOORE & FRAWLEY,
RICHEY & RICHEY,

Attorneys for Intervenor, Asma Rubaiz.

State of Arizona,
County of Pima,—ss.

Asma Rubaiz, being first duly sworn, deposes and says: That she is the petitioner herein; that she has read the above and foregoing motion and knows the contents thereof, and that the same is true in substance and in fact, to the best of her knowledge and belief.

ASMA RUBAIZ.

Subscribed and sworn to before me this 10th day of May, 1920.

[Seal]

A. T. SMITH,
Notary Public.

My commission expires May 12, 1920.

[Endorsed]: E.-70. In the District Court of the United States, in and for the District of Arizona. Tucson Gas, Electric Light & Power Company, a Corporation, Plaintiff, vs. Tucson Rapid Transit Company, a Corporation, Defendant, and Asma Rubaiz and The International Trust Company, a Corporation, Intervenor. Motion of Intervenor Asma Rubaiz to Dismiss Complaint of The International Trust Company. Filed May 11, 1920. C. R. McFall, Clerk. By J. Lee Baker, Chief Deputy Clerk. Richey & Richey, Attorneys for Intervenor, Asma Rubaiz. [92]

In the District Court of the United States, in and
for the District of Arizona.

TUCSON GAS, ELECTRIC LIGHT & POWER
COMPANY, a Corporation,

Plaintiff,

vs.

TUCSON RAPID TRANSIT COMPANY, a Cor-
poration,

Defendant,

and

ASMA RUBAIZ and THE INTERNATIONAL
TRUST COMPANY, a Corporation,

Intervenors.

**Motion of Intervenor Asma Rubaiz to Strike Out
Answer of Tucson Rapid Transit Company to
Her Complaint in Intervention.**

Comes now Intervenor Asma Rubaiz and makes
and files this her motion to strike out the answer
of Tucson Rapid Transit Company to her complaint
in intervention in the above-entitled cause for
reasons as follows:

1. Because said answer does not state any facts
or grounds sufficient to constitute or entitle The
International Trust Company, an intervenor herein,
to a valid or any priority or superiority of its mort-
gage lien over the judgment lien of your petitioner
on the money or other personal property of the

Tucson Rapid Transit Company, defendant above named, now in the hands of the Receiver in this action.

2. Because said answer does not state any facts or grounds sufficient to entitle said The International Trust Company to any equitable relief whatever as against or involving the money or other personal property of the Tucson Rapid Transit Company, (1) defendant herein, now in the hands of the Receiver herein, as against the lien of Intervenor Asma Rubaiz.

3. Because said answer shows on its face that said Tucson Rapid Transit Company is colluding with said The International Trust Company, intervenor, and Tucson Gas, Electric Light and Power Company, plaintiff above named, "to have any of the property or assets of the said Tucson Rapid Transit Company that may be necessary used for the protection and preservation of said property in whole or in part" to secure to said The International Trust Company its indebtedness under the [93] mortgage of said Tucson Rapid Transit Company to said The International Trust Company, and to defeat the claim and lien of Intervenor Asma Rubaiz, and to divert the moneys belonging to said Tucson Rapid Transit Company now in the hands of the Receiver in this action, from the claim and lien of the said Intervenor Asma Rubaiz, to the protection of the mortgage of said The International Trust Company by applying same to the

“paving in order to improve the security of the said Trustee,” The International Trust Company.

WHEREFORE, your petitioner, Asma Rubaiz, prays that said answer of Tucson Rapid Transit Company to the complaint in intervention of your petitioner be stricken out as to Intervenor Asma Rubaiz, and for such other and further relief in the premises as may be just and equitable.

MOORE & FRAWLEY,
RICHEY & RICHEY,

Attorneys for Intervenor, Asma Rubaiz. (2)

State of Arizona,
County of Pima,—ss.

Asma Rubaiz, being first duly sworn, deposes and says: That she is the petitioner herein; that she has read the above and foregoing motion and knows the contents thereof, and that the same is true in substance and in fact, to the best of her knowledge and belief.

ASMA RUBAIZ.

Subscribed and sworn to before me this 10th day of May, 1920.

[Seal]

A. T. SMITH,
Notary Public.

My commission expires May 12, 1920.

[Endorsed]: E.-70. In the District Court of the United States, in and for the District of Arizona. Tucson Gas, Electric Light & Power Company, a Corporation, Plaintiff, vs. Tucson Rapid Transit

Company, a Corporation, Defendant, and Asma Rubaiz and The International Trust Company, a Corporation, Intervenor. Motion of Intervenor Asma Rubaiz to Strike Out Answer of Tucson Rapid Transit Company to Her Complaint in Intervention. Filed May 11, 1920. C. R. McFall, Clerk. By J. Lee Baker, Chief Deputy Clerk. Richey & Richey, Attorneys for Intervenor, Asma Rubaiz. [94]

In the District Court of the United States, in and
for the District of Arizona.

TUCSON GAS, ELECTRIC LIGHT & POWER
COMPANY, a Corporation,

Plaintiff,

vs.

TUCSON RAPID TRANSIT COMPANY, a Corporation,

Defendant,

and

ASMA RUBAIZ and THE INTERNATIONAL
TRUST COMPANY, a Corporation,

Intervenor.

**Motion of Intervenor Asma Rubaiz to Strike Out
Answer of the Tucson Gas, Electric Light &
Power Company to Her Complaint in Inter-
vention.**

Comes now intervenor, Asma Rubaiz, and makes

and files this her motion to strike out the answer of the Tucson Gas, Electric Light & Power Company to her complaint in intervention in the above-entitled cause for reasons as follows:

1. Because said answer does not state any facts or grounds sufficient to constitute or entitle The International Trust Company, an intervenor herein, to a valid or any priority or superiority of its mortgage lien over the judgment lien of your petitioner on the money and other personal property of the Tucson Rapid Transit Company, defendant above named, now in the hands of the Receiver in this action.

2. Because said answer does not state any facts or grounds sufficient to entitle said The International Trust Company to any equitable relief whatever as against or involving the money or other personal property of the Tucson Rapid Transit Company, defendant herein, now in the hands of the Receiver herein, as against the lien of Intervenor Asma Rubaiz. (1)

3. Because said answer shows on its face that said The Tucson Gas, Electric Light & Power Company is colluding with the said The International Trust Company, intervenor, and Tucson Rapid Transit Company, defendant above named, to have the property and assets of said Tucson Rapid Transit Company used for the protection, preservation and enhancement of the value of the security of the mortgage of the said The International Trust

[95] Company, and to defeat the claim and lien of Intervenor Asma Rubaiz, and to divert the moneys belonging to said Tucson Rapid Transit Company now in the hands of the Receiver in this action, from the claim and lien of the said Intervenor Asma Rubaiz, to “pave said portion of said street in order to protect the bonds of the said Tucson Rapid Transit Company and preserve the said franchise from forfeiture,” to the sole end that the security of the mortgage of the said The International Trust Company may be increased.

WHEREFORE, your petitioner, Asma Rubaiz, prays that said answer of the Tucson Gas, Electric Light & Power Company to the complaint in intervention of your petitioner be stricken out as to Intervenor Asma Rubaiz, and for such other and further relief in the premises as may be just and equitable.

MOORE & FRAWLEY,
RICHEY & RICHEY,

Attorneys for Intervenor Asma Rubaiz.

State of Arizona,

County of Pima,—ss.

Asma Rubaiz, being first duly sworn, deposes and says: That she is the petitioner herein; that she has read the above and foregoing motion and knows the contents thereof, and that the same is true in substance and in fact, to the best of her knowledge and belief.

ASMA RUBAIZ.

Subscribed and sworn to before me this 10th day of May, 1920.

[Seal]

A. T. SMITH,
Notary Public.

My commission expires May 12, 1920.

[Endorsed]: E.-70. In the District Court of the United States, in and for the District of Arizona. Tucson Gas, Electric Light & Power Company, a Corporation, Plaintiff, vs. Tucson Rapid Transit Company, a Corporation, Defendant, and Asma Rubaiz and the International Trust Company, a Corporation, Intervenor. Motion of Intervenor Asma Rubaiz to Strike Out Answer of the Tucson Gas, Electric Light & Power Company to Her Complaint in Intervention. Filed May 11, 1920. C. R. McFall, Clerk. By J. Lee Baker, Chief Deputy Clerk. Richey & Richey, Attorneys for Intervenor Asma Rubaiz. [96]

In the District Court of *the State of Arizona*, in
and for the District of Arizona.

TUCSON GAS, ELECTRIC LIGHT & POWER
COMPANY, a Corporation,

Plaintiff,

vs.

TUCSON RAPID TRANSIT COMPANY, a Cor-
poration,

Defendant,

Report of Receiver.

The undersigned hereby files his report showing the operations of the property of the Tucson Rapid Transit Company under his receivership, to the first day of May, 1920.

During the year 1919 the gross receipts from the property amounted to the sum of \$34,597, and in the four months of the year 1920 the gross receipts have been \$14,274.95 as against \$10,515.86, being an increase of \$3,759.09 or 35.7 per cent increase, thus showing total receipts of \$48,871.

The Receiver had on hand in cash on the first day of May, 1920, deposited in the Arizona National Bank to his credit, \$9,467.19. All taxes and other fixed charges against the property, excepting interest on the bonds, have been paid. During the month of April, 1920, the gross receipts of the Company amounted to \$3,917.90 compared with \$3,000.32 for the similar month last year, being an increase of \$917.58, or 30.6 per cent. The operating expenses during the month of April have been \$2,501.18 as against \$2,469.31 for the similar month of last year, being an increase of \$31.87 or 1.3 per cent. The net earnings of the Company have been \$1,416.72 as against \$531.01 for the same month of last year, an increase of \$885.71 or 166.8 per cent.

The net income of the property for the month of April will be sufficient to pay the interest on bonds, amounting to \$574 and the interest on notes,

amounting to \$400, being a total of \$974, and leave a net revenue of \$442.72. This is the first month that the property has in fact earned a surplus over and above its fixed expenses and charges.

There were carried, during the month of April, 51,531 [97] revenue passengers against 39,549 for the previous year. The number of car miles operated in April, 1920, was 12,122 and in April, 1919, 12,052. The number of cars operated was the same; five in each month. The total consumption of electricity during the month was 14,510 kilowatt hours in 1920, as against 14,850 in the similar month of 1919.

It is becoming more evident that the public has become reconciled to the increase in fare from five to eight cents.

On the first day of April, 1920, Asma Rubiaz filed her petition for leave to intervene in said cause, and on the 20th day of April, 1920, her petition was granted, and on the 27th day of April, 1920, the trustees for the bondholders filed their petition in intervention. The amount of cash on hand, in the possession of the receiver on the first day of April, 1920, was \$8,368.77, but there were taxes which had to be paid during the month of April, of \$637.40.

The physical condition of the company and its plant is good; its property has been kept in good repair; the operating force has performed its duty with care and faithfulness. The Receiver again calls the attention of the Court to the fact that

paving has been ordered by the City Council from the crossing of the S. P. road on Stone Avenue north along Stone Avenue to Third Street, and the paving is now in process of being laid. The company will be compelled to pave its track and a foot on each side of its rails during this distance, or its franchise may, at the option of the City Council, be declared *forfeit*. (2) The estimated expense of this paving will be \$9,800, and the Receiver requests the instructions of the Court, whether he shall be allowed to use any, and if so, what amount, of the funds now in his hands for the purpose of doing said paving. The money in the hands of the Receiver is claimed by Asma Rubiaz to be subject to the payment of her judgment, which amounts to about \$5,000, with interest and costs to date. The Trustees for the bondholders also claim that they have a first and prior lien upon all the assets now in the hands of the Receiver, and that the income should be applied to the payment of interest upon their [98] lien. The Tucson Gas, Electric Light and Power Company claims that by the filing of the bill in this cause, under which this Receiver was appointed, they thereby acquire an equitable levy upon the income of said property, and that the net income thereof should be paid to it upon this debt. The Receiver does not feel that it is either his province or privilege to determine the priorities of the various parties to the funds in his hands, and he submits the matter to the Court, with the prayer

that the Court instruct him, to whom, and in what amounts said money shall be paid out.

Respectfully submitted,

EDWIN F. JONES,

Receiver, Tucson Rapid Transit Company, a Corporation.

[Endorsed]: In the District Court of the United States, in and for the District of Arizona. Tucson Gas, Electric Light and Power Company, a Corporation, Plaintiff, vs. Tucson Rapid Transit Company, a Corporation, Defendant. Report of Receiver. E.-70, Tucson. Filed May 24, 1920. C. R. McFall, Clerk. By J. Lee Baker, Chief Deputy Clerk. [99]

In the District Court of the United States, in and
for the District of Arizona.

TUCSON GAS, ELECTRIC LIGHT AND
POWER COMPANY, a Corporation,
Plaintiff,

vs.

TUCSON RAPID TRANSIT COMPANY, a Corporation,
Defendant,

and

ASMA RUBAIZ,

Intervenor.

**Order to Receiver to Make Partial Payment of
Claim of Asma Rubaiz.**

IT IS HEREBY ORDERED that the Receiver herein be and he is hereby authorized to pay out of the funds now in his hands the sum of Nine Hundred Sixty and 05/100 Dollars (\$960.05) to Asma Rubaiz, to apply on her judgment in claim before this court in this cause, said sum being the net amount received by him from the operation of the street railway now in his hands under the order of the Court herein, from April 1st to April 27th, 1920, inclusive, after operating expenses and fees of the Receiver for said time have been paid.

Further action of the Court on the matter of the Rubaiz claim in this cause will be taken under advisement.

Dated at Tucson, Arizona, this 24th day of June, 1920.

WM. H. SAWTELLE,
District Judge.

[Endorsed]: In the District Court of the United States, in and for the District of Arizona. Tucson Gas, Electric Light and Power Company, a Corporation, Plaintiff, vs. Tucson Rapid Transit Company, a Corporation, Defendant, and Asma Rubaiz, Intervenor. Order to Receiver to Make Partial Payment on Claim of Asma Rubaiz. E.—70. Copy received this 23d day of June, 1920. Geo. O. Hil-

zinger, Atty. for Tucson Rapid Tr. Co. Copy received this 23d June. Edwin F. Jones, Rec. Kingan & Campbell, Attys. for Internat'l Trust Co. & Tucson Gas, E. L. & P. Co. Filed June 24, 1920. C. R. McFall, Clerk. [100]

In the District Court for the United States for the
District of Arizona.

TUCSON GAS, ELECTRIC LIGHT & POWER
COMPANY, a Corporation,

Plaintiff,

vs.

TUCSON RAPID TRANSIT COMPANY, a Corporation,

Defendant.

Report of Receiver.

To the Honorable WILLIAM H. SAWTELLE,
Judge:

The undersigned begs leave to submit the following report concerning the operations of the property of the Tucson Rapid Transit Company:

I enclose herewith itemized statement of the operations of the company for the month of February, 1921. The statement for the month of March will not be available until the 10th of April, when the payrolls and overhead will have been checked and a balance struck, at which time it will be filed.

There is on deposit to my credit as Receiver on the third day of April, 1921, the sum of \$11,756.19. This sum represents the entire receipts of the company, less its absolute running expenses, since the property has been in the hands of the Court. The Receiver in this case was appointed on the 22d day of February, 1919, consequently two years have elapsed up to the date of the report.

The general situation of the business is that for about eight months in the year there is a small balance varying from one to three hundred dollars per month and during the summer months of June, July and August, owing to the fact that the University is not then in operation, always shows a loss. The physical property of the company has been kept in fair repair, although the effect of wear is indisputable upon the rolling stock. The high price of material and labor has made it very difficult to operate the system at any profit, but materials are at last slowly declining [101] and I hope that the future will show better results.

On December fifth there was served upon the company by the City Clerk a notice, a copy of which is hereto annexed.

In compliance with that notice I personally appeared before the City Council and explained to them the situation. They took the matter under advisement, and on the 10th of December I wrote to the City Clerk a letter, a copy of which is also hereto annexed. Since that time the Council then in office

has given place to a new Council, on January first, and the city authorities have taken no further active steps to force the paving on North Stone Avenue.

If it be determined that the company must pave North Stone Avenue, it will very near, if not completely, exhaust the amount now on hand, as this portion of the road contains the passing switch which will necessitate some special steel work which is very expensive. I am now engaged in having the width of North Sixth Avenue on Third Street paved, so that the crossing there may be free from objection; also the curve at the intersection of Stone Avenue and Third Street, and the spur-track from our line into the car-barn on North Stone Avenue are being paved, and I propose to take out the cement the width of Sixth Avenue on Congress Street, which has shown decided signs of wear, and either replace it with new cement or bitulithic top. The paving of this Sixth Avenue crossing and this curve will, to a large extent, obviate any objection which might be reasonably urged against the condition of the track. As I stated in my letter to Judge Cowan, in December, I have no desire to evade or refuse any necessary repairs to make the street railroad safe and unobjectionable to the public.

A detailed statement of the operations during the

month of March will be filed in court on the tenth of this month.

Respectfully submitted,

EDWIN F. JONES,

Receiver, Tucson Rapid Transit Company (2)

[102]

CITY OF TUCSON,
Pima County, Arizona.
City Hall.

December 4th, 1920.

Tucson Rapid Transit Company,

Tucson, Arizona.

Gentlemen:

Pursuant to an order made by the Mayor and Common Council of the City of Tucson on the first day of December, 1920, you are hereby notified to pave the street between the rails thereof, and for one foot on each side of such rails on North Stone Avenue and Third Street, so that the grade of said street may be uniform with the paving recently done from the Southern Pacific Company right of way on Stone Avenue to Third Street.

This notice is given you in pursuance to Ordinance No. 203 of the ordinances of the Mayor and Common Council of the City of Tucson.

An immediate reply to this communication is required.

Respectfully,

L. O. COWAN,
City Clerk. [103]

Tucson, Arizona, December 10, 1920.

Hon. L. O. Cowan,
City Clerk,
Tucson, Arizona.

Dear Sir:

This is to acknowledge receipt of your notice of December 4, 1920, addressed to the Tucson Rapid Transit Company.

I wish to call your attention to the fact that your letter recites that the notice therein contained is given under and in pursuance of Ordinance 203 of the City Council.

This ordinance is not now in force, and the Tucson Rapid Transit Company is not operating its line under this ordinance, but under the amended ordinance passed in 1913 or 14.

I further desire to state in addition to the statement made at the last meeting of the council, that the property of which I am the Receiver, is in the hands of the Federal Court, and that I can take no action which I might wish to take in regard to it without first obtaining the approval of the Judge of that Court. Judge Sawtelle is now engaged in holding Court in Phoenix, and will not finish his work there until just before Christmas, and I do not think will hold any Court here until after the first of the year, and I respectfully ask that no action be taken until I can submit the whole situation to him upon his return here, and have the benefit of his

direction and advice in my efforts to meet the requirements of the Council.

I can assure the Council that I have no desire to evade paving the street, and I would have done so before I had had the means with which to do it, and I shall use every endeavor to obtain the necessary funds to make this needed improvement, but candor with the Council compels me to say that I now do not see where I am to obtain the means to do it, and I trust the Council can see its way to defer action until matters are a little clearer.

Yours very truly,

(Signed) EDWIN F. JONES,

Receiver, Tucson Rapid Transit.

EFJ/MIB. [104]

Statement of Profit and Loss.

STATEMENT OF PROFIT AND LOSS

TUCSON RAPID TRANSIT CO.

ALL DEPARTMENTS

Month of February	2 Months from 12/31/20				Per Unit	
	This Year	Last Year	Increase Amount	%	This Year	Current Month This Year Last Year
GROSS EARNINGS						
Electric Department						
Railway Department	3 660 52	3 304 79	355 73	10.8	7 581 92	11.5
Gas Department						
Ice Department						
Water Department						
Total Gross Earnings	3 660 52	3 304 79	355 73	10.8	7 581 92	11.5
OPERATING EXPENSES						
Electric Department						
Railway Department	3 282 11	3 126 95	155 16	5.0	6 528 03	4.9
Gas Department						
Ice Department						
Water Department						
Total Oper. Expenses	3 282 11	3 126 95	155 16	5.0	6 528 03	4.9
NET EARNINGS						
Electric Department						
Railway Department	378 41	177 84	200 57	112.8	1 053 89	83.0

	Month of February		2 Months from 12/31/20		Increase		Per Unit	
	This Year	Last Year	Amount	%	This Year	Last Year	Amount	%
Gas Department								
Ice Department								
Water Department								
Total Net Earnings	378 41	177 84	200 57	112.8	1 053 89	575 73	478 16	83.0
INTEREST CHARGES								
Interest on Bonds								
Interest on Notes	574 00	574 00			1 148 00	1 148 00		
Interest on	400 00	400 00			800 00	800 00		
Interest Credits						1 51	1	51
Total Interest	974 00	974 00			1 948 00	1 946 49	1	51
Net Less Interest	595 59	796 16	200 57		984 11	1 370 76	476	65
DEDUCTIONS								
Depreciation								
Total Deductions	595 59							
SURPLUS FOR MONTH								
Surplus 1 Months	298 52							
Surplus 12/31/20	894 11							
2/28/21	984 11				894 11			
DIVIDENDS								
Surplus (Per Bal. Sheet)	984 11							
	894 11							

	Month of February		2 Months from 12/31/20		Increase
	This Year	Per Last Year	Per Last Year	This Year	
REVENUE, NON-TRANSPORTATION	20 83	Car M	Car M	41 66	41 66
Station and Car Privileges	20 83		20 83	41 66	
Parcel-Room					
Storage					
Car Service					
Telephone and Telegraph Service					
Rents of Tracks, Etc.					
Rents of Equipment					
Rents of Buildings, Etc.					
Power					
Miscellaneous					
TOTAL REVENUE, NON-TRANSPORTATION	20 83		20 83	41 66	41 66
GROSS EARNINGS	3 660 52		3 304 79	7 581 92	6 796 90
OPERATING EXPENSES				355 73	785 02
Maintenance Way and Structure	96 85		233 71	136 86	136 86
Maintenance Equipment	821 14		351 25	469 89	177 87
Traffic Expenses				1 387 51	505 28
Superintendence Transportation					594 17
Power	382 73		460 95	890 69	793 34
Operation of Cars	1 111 03		849 75		
General Expenses	870 36		1 231 29	2 219 55	973 83
TOTAL OPERATING EXPENSES	3 282 11		3 126 95	1 852 41	83 14
NET EARNINGS FROM OPERATION	378 41		177 84	6 528 03	1 731 33
Operating Ratio	89.7%		94.6	2 416 56	488 22
				6 221 17	564 15
				1 053 89	306 86
				86 1	478 16
				91.5	[106]

OPERATING EXPENSES RAILWAY DEPARTMENT				February 28, 1921.	
MONTH OF				MONTHS FROM	
TUCSON RAPID TRANSIT COMPANY				This Year	
ACCT.				Last Year	
No.				Increase	
MAINTENANCE WAY AND STRUCTURES					
R 1 Superintendence					
R 2 Maintenance, Roadway and Track					
R 3 Removal Snow, Ice and Sand					
R 4 Other Maintenance of Way					
R 5 Poles and Fixtures					
R 6 Underground Conduits					
R 7 Transmission System					
R 8 Distribution System					
R 9 Miscellaneous Electric Line Expenses					
R 10 Buildings and Structures					
R 12 Other Operations, Dr.					
R 13 Other Operations, Cr.					
TOTAL Maint. Way & Structures					

February 28, 1921.

MONTHS FROM

This Year

Last Year

Increase

This Year

Last Year

Per Increase

Car M.

Car M.

233 71

154 65

147 68

494 46

346 78

1 66

1 66

9 16

21 03

17 79

17 79

30 19

505 28

327 41

136 86

177 87

233 71

96 85

ACCT. No.		MONTH OF			MONTHS FROM			
		This Year	Per Car M.	Last Year	Per Car M.	This Year	Last Year	Increase
MAINTENANCE EQUIPMENT								
R 14	Superintendence							
R 15	Power-Plant Equipment							
R 16	Sub-Station Equipment							
R 17	Maintenance, Cars and Locomotives	340 33		254 55	85 78	654 66	352 10	302 56
R 18	Maintenance, Electric Equipment of Cars and Locomotives	480 81		96 70	384 11	732 85	242 07	490 78
R 19	Miscellaneous Equipment Expenses							
R 21	Other Operations, Dr.							
R 22	Other Operations, Cr.							
R 23	TOTAL Maintenance Equipment	821 14		351 25	469 89	1 387 51	594 17	793 34
TRAFFIC EXPENSES								
CONDUCTING TRANSPORTATION								
R 24	SUPERINTENDENCE							
POWER								
R 25	Power-Plant Employees							
R 26	Sub-Station Employees							
R 27	Fuel							
R 28	Water							
R 29	Lubricants							
R 30	Miscellaneous Supplies and Ex- penses							
R 31	Sub-Station Supplies and Expenses							
R 32	Power Purchased from The Tucson G. E. L&P Co.	382 73		460 95	78 22	890 69	973 83	83 14
	TOTAL POWER	382 73		460 95	78 22	890 69	973 83	83 14
[107]	AMOUNT FORWARD	382 73		460 95	78 22	890 69	973 83	83 14

TUCSON RAPID TRANSIT COMPANY		OPERATING EXPENSES				February 28, 1921.	
ACCT.		RAILWAY DEPARTMENT		MONTHS FROM			
No.	No.	MONTH OF		This Year		Last Year	
		This Year	Per Last Year	Per Increase	This Year	Last Year	Increase
CONDUCTING TRANSPORTATION		Car M.		Car M.			
—Cont'd							
	AMOUNT BROUGHT FORWARD	382 73	..	460 95	78 22	890 69	973 83
OPERATION OF CARS							
R36	Passenger Conductors,						
	Motormen and Trainmen	695 26		511 75	183 51	1 465 31	1 058 23
R37	Freight and Express Conductors,						
	Motormen and Trainmen						
R38	Miscellaneous Car Service						
	Employees and Expenses	294 67		251 27	43 40	545 49	507 84
R39	Station Employees and Expenses						
R40	Car House Employees and Expenses	121 10		86 73	34 37	208 75	165 26
R41	Signal, Interlocking,						
	Telegraph and Telephone System						
R42	Freight and Express Collection						
	and Delivery						
R43	Loss and Damage						
R44	Other Transportation Expenses						
TOTAL OPERATION OF CARS		111 03	849 75	261 28		2 219 55	1,731 33
TOTAL Conducting Transport'n		1 493 76	1 310 70	183 06		3 110 24	2 705 16
							488 22
							405 08

ACCT. No.		This Year	MONTH OF		Per Car M.	Per Car M.	MONTHS FROM		Increase
			Last Year	Car M.			This Year	Last Year	
GENERAL EXPENSES									
R50	Salaries and Expenses of Gen'l Officers	89 17	70 01		19 16	178 34	140 02	38 32	
R51	Salaries & Exp. of Gen'l Office Clerks	47 74	36 24		11 50	95 48	72 48	23 00	
R52	General Office Supplies and Expenses	34	2 38		2 04	1 22	2 38	1 16	
R53	Law Expenses	158 33	8 33		150 00	466 66	16 66	450 00	
R54	Miscellaneous General Expenses	60 75	37		60 38	65 50	3 62	61 88	
R54a	Auditing Expenses		20 00		20 00		40 00	40 00	
R54b	Rate Case Expenses								
R54c	Inventory Shrinkage								
R55	Other Operations, Dr.								
R56	Other Operations, Cr.								
R57	Injuries and Damages	156 86	834 92		678 06	314 52	1 670 91	1 356 39	
R58	Stationery and Printing								
R59	Store Expenses	8 76	6 26		2 50	17 52	12 52	5 00	
R60	Garage and Stable Expenses	143 24	72 59		70 65	302 83	72 59	230 24	
R67	Rent of Tracks and Terminals								
R68	Rent of Equipment								
R61	Rent	27 78	25 00		2 78	55 56	75 00	19 44	
R62	Insurance	52 39	30 19		22 20	104 78	60 38	44 40	
R63	Taxes	125 00	125 00			250 00	250 00		
TOTAL GENERAL EXPENSES		870 36	1 231 29		360 93	1 852 41	2 416 56	564 15	

[108]

TUCSON RAPID TRANSIT COMPANY
BALANCE SHEET

Feb. 28, 1921.

ASSETS	AMOUNT	TOTAL
INVESTMENTS:		
PLANT, PROPERTY, ETC.:		
Balance December 31, 1920		688 733 59
Additions Current year		
Electric Construction		
Railway Construction	77 26	
Gas Construction		
TOTAL ADDITIONS CURRENT YEAR		77 26
TOTAL PLANT, PROPERTY, ETC.:		688 810 85
INVESTMENTS IN AFFILIATED COMPANIES:		
OTHER INVESTMENTS		
TOTAL INVESTMENTS,		
CURRENT ASSETS:		
Cash, Petty	25 00	
Cash, General	4 220 02	
Notes Receivable		
Accounts Receivable, Customers Current Month		
Accounts Receivable, Customers Previous Months		
Accounts Receivable, Miscellaneous (Ex-Allied Cos.)	24 09	
Fuel		
Supplies	3 497 40	
Apparatus Rented or Loaned		
Coke, Tar, Etc.		
Accrued Interest Receivable		
The International Trust Co., Trustee	200 00	
TOTAL CURRENT ASSETS,		7 966 51

**ALLIED COMPANIES (NOTES AND AC-
COUNTS):**

Federal Light & Traction Company

**TOTAL NOTES AND AC-
COUNTS RECEIVABLE, AL-
LIED COS.**

UNADJUSTED DEBITS:

Insurance Premiums Paid in Advance

Taxes, Rents or Interest Paid in Ad-
vance

62 66

Cost of Signs

62 66

Deficit 12/31/20

83 870 76

Deficit as per Statement of Profit & Loss

894 11

TOTAL DEFICIT

84 764 87

TOTAL UNADJUSTED DEBITS

GRAND TOTAL

781 604 89

[109]

**TUCSON RAPID TRANSIT COMPANY
BALANCE SHEET**

February 28, 1921.

CAPITAL STOCK, LIABILITIES AND

SURPLUS

AMOUNT

TOTAL

CAPITAL STOCK OUTSTANDING:

Preferred

Common

500 000 00

**TOTAL CAPITAL STOCK OUT-
STANDING**

500 000 00

LONG TERM DEBT

Funded Debt Unmatured

1st Mortgage Bonds Dated 3/15/06

114 800 00

Non-negotiable Debt to Affiliated Cos.

Demand Notes Payable to The Tucson

Gas, El. Lt. & Pr. Co.

60 000 00

TOTAL LONG TERM DEBT,

174 800 00

CURRENT LIABILITIES:

Accounts Payable (Ex. to Allied Cos.)	740 09
Pay Roll	712 42
Meter Deposits	
Conductors Deposits	57 00
Contract Deposits	
Tickets Outstanding	36 24
Unclaimed Wages	7 17

TOTAL CURRENT LIABILITIES, 1 552 92
**ALLIED COMPANIES (ACCOUNTS PAY-
 ABLE)**

Federal Light & Traction Company	
Accts. Payable	237 53
Open Account	1 414 48
Accrued Interest on Bonds	90 401 25
Accrued Interest on Notes	
THE TUCSON GAS, ELEC. LT. & PR. CO.	
Open Account	7 058 61
Accounts Payable	488 04
Accrued Interest on Notes	800 00

**TOTAL ACCOUNTS PAYABLE TO
 ALLIED COS.** 100 399 91

UNADJUSTED CREDITS:

Tax Liability	1 202 67
Accrued Interest on Bonds (Ex. F. L. & T. Co.)	89 75
Accident Reserve	383 99
Appliances Rented Reserve	
Auditing Reserve	240 47
Bad Debt Reserve	
Depreciation Reserve	
Donation Reserve Fire Suspense	1 095 18
Discount Reserve	56 25
Inventory Reserve	617 03
Depreciation Reserve Automobiles	1 166 72

TOTAL UNADJUSTED CREDITS, 4 852 06
CORPORATE SURPLUS

Balance December 31, 19
 Surplus per Statement of Profit and Loss
 of All Departments

TOTAL CORPORATE SURPLUS
GRAND TOTAL

781 604 89

Additions to Plant and Property Railway Department.

TUCSON RAPID TRANSIT COMPANY		DATE	FISCAL	CURRENT
ACCT.		ACQUISITION	YEAR	MONTH
No.		5-31-10	From 12-31-20	
		To 12-31-20	To 1-31-21	
ROAD:				
R101	Engineering and Superintendence	8 155 79		7 02
R102	Right of Way	158 00		
R103	Other Land Used in Electric Rail- way Operations	45 85		
R104	Grading	2 256 75		
R105	Ballast	9 746 53		
R106	Ties	115 28		
R107	Rails, Rail Fastenings and Joints	6 337 47		
R108	Special Work	433 81		
R109	Underground Construction			
R110	Paving	1 009 31		
R111	Track Laying and Surfacing	9 382 97		
R112	Roadway Tools	410 77		
R113	Tunnels			
R114	Elevated Structures and Founda- tions	38 41		
R115	Bridges, Trestles and Culverts			
R116	Crossings, Fences, Cattle Guards and Signs			
R117	Interlocking and Other Signal Ap- paratus			
R118	Telegraph and Telephone Lines			
R119	Poles and Fixtures	729 76		
R120	Underground Conduits			
R121	Transmission System			
R122	Distribution System	749 50		
R123	Dams, Canals and Pipe Lines			
R124	Power Plant Buildings			
R125	Sub Station Buildings			
R126	General Office Buildings			
R127	Shops and Car Houses	358 96		

TUCSON RAPID TRANSIT COMPANY		DATE	Fiscal	CURRENT
ACCT.		ACQUISITION	YEAR	MONTH
No.		5-31-10	From 12-31-20	
ROAD.		To 12-31-20	To 1-31-21	
R128	Stations, Waiting Rooms and Miscellaneous Buildings		70	24
R129	Docks and Wharves			
R130	Power Plant Equipment	130		
R131	Sub Station Equipment			
R132	Shop Equipment	266		
R133	Park and Resort Property			
R134	Cost of Road Purchased			
EQUIPMENT:				
R135	Cars	23	877	01
R136	Locomotives			
R137	Electric Equipment of Cars	883		20
R138	Other Rail Equipment			
R139	Miscellaneous Equipment			
R135a	Auto Buses	3	500	00
MISCELLANEOUS—DURING CONSTRUCTION:				
R140	Law Expenses	150		00
R141	Interest	333		33
R142	Injuries and Damages	21		00
R143	Taxes	1	225	05
R144	Miscellaneous			
TOTAL ADDITIONS—RAILWAY				
DEPARTMENT		69	823	97
			70	24
				7 02

Additions to Plant and Property Gas Department.

February 28, 1921.

ACCT. No.	DATE ACQUISITION	FISCAL YEAR	CURRENT MONTH
TUCSON RAPID TRANSIT COMPANY	5-31-10	From 12-31-20	
G101 ORGANIZATION	To 12-31-20	To 1-31-21	
G102 ROYALTIES, FRANCHISES AND LICENSES			

GAS PLANT:

G103	Land Devoted to Gas Operations
G104	Works and Station Structures
G105	Holders
G106	Furnaces, Boilers and Accessories
G107	Steam Engines
G108	Gas Engines
G109	Miscellaneous Power Plant Equip- ment
G110	Benches and Retorts
G111	Water Gas Sets and Accessories
G112	Purification Apparatus
G113	Accessory Equipment at Works

DISTRIBUTION:

G146	Trunk Lines and Mains
G147	Gas Services
G148	Gas Meters
G149	Gas Meter Installation
G151	MUNICIPAL STREET-LIGHTING FIXTURES

GAS ENGINES AND APPLIANCES

OTHER EQUIPMENT:

G171	Land in Other Departments
G172	General Structures
G173	General Equipment
G177	Gas Laboratory Equipment
G178	Gas Tools and Implements
G179	Other Tangible Gas Capital

ACCT. MISCELLANEOUS — DURING CON-**No. STRUCTION:**

G181	Engineering and Superintendence
G182	Law Expenditures
G183	Taxes
G184	Interest
G185	Injuries
G186	Miscellaneous

**TOTAL ADDITIONS — GAS DE-
PARTMENT**

**SUMMARY OF ADDITIONS to
Plant and Property from Date of
Acquisition to and incl'd'g
Current Month**

**ADDITIONS PER DETAILED
SHEET**

Electric Department				
Railway Department	69 823 97	70 24		7 02
Gas Department	69 823 97	70 24		7 02
TOTAL ADDITIONS ALL DEPART- MENTS				
ADDITIONS FROM DATE OF ACQUISITION	*** **	*** **	69 823	97
ADDITION FISCAL YEAR (Ex. Current Mo.)	*** **	70 24	*** **	**
ADDITIONS CURRENT MONTH	*** **	7 02	77	26
TOTAL ADDITIONS FROM DATE OF ACQUISITION	*** **	*** **	*** **	**
5-31-10 to 2-28-21	*** **	*** **	69 901	23

ADD:

Balance at Date of Acquisition	*** **	*** **	618 909	62
TOTAL PROPERTY AC- COUNTS (Per Balance Sheet)	*** **	*** **	688 810	85

Statistics.

STATISTICS

RAILWAY DEPARTMENT

TUCSON RAPID TRANSIT COMPANY

February 28, 1921.

Last Year

This Year

		Ratio of		Cents per Revenue		Dollars per Mile		Ratio of		Cents per Revenue		Dollars per Mile	
		Gross Earnings		Car Mile Operated		Revenue of Single Passenger Track		Gross Earnings		Car Mile Operated		Revenue of Single Passenger Track	
Total		1,000	33.17	7.56	841	3304.79	1,000	27.81	7.63	760			
1	TOTAL GROSS EARNINGS	3660.52											
2	OPERATING EXPENSES												
3	Maintenance of Way and Structures	96.85	.027	.90	.20	233.71	.071	1.97	.54	54			
4	Maintenance of Equipment	821.14	.224	7.43	1.70	351.25	.106	2.94	.81	81			
5	Power	382.73	.105	3.48	.79	460.95	.139	3.87	1.06	106			
6	Conducting Transportation (Excluding Power)	1111.03	.303	10.05	2.29	849.75	.257	7.15	1.96	195			
7	General Expenses	870.36	.238	7.89	1.80	1231.29	.373	10.38	2.85	283			
8	TOTAL OPERATING EXPENSES	3282.11	.897	29.75	6.78	3126.95	.946	26.31	7.22	179			
9	NET EARNINGS FROM OPERATION	378.41	.103	3.42	.78	177.84	.054	1.50	.41	41			

	Passenger			Express Non-Revenue			Passenger			Express Non-Revenue		
	Total	Motor Cars	Trail Cars	Total	Trail Cars	Express Non-Revenue	Total	Motor Cars	Trail Cars	Total	Trail Cars	Express Non-Revenue
30 Population Served	20000						17000					
31 Gross Earnings per Capita	.183						.194					
32												
33 MONTHLY PAY ROLL:												
34 Number of Men Regularly Employed	14						14					
35 Number of Extra Men Employed	3						3					
36 Total Hours of Labor Charged to "Operation"	2990						2875					
37 Total Hours of Labor Charged to "Construction"												

38

39

TUCSON RAPID TRANSIT COMPANY.

GENERAL LEDGER ACCOUNTS.

FEBRUARY 28, 1921.

FEDERAL LIGHT AND TRACTION CO.—

OPEN ACCT.

Feb. 1. Balance..... 1644.99

Feb. 28. Engineering & Supt..... 7.02

1652.01

Feb. 28. Cash..... 237.53

Feb. 28. Balance..... 1414.48

THE TUCSON GAS, ELEC. LT. & PR. CO.—

OPEN ACCT.

Feb. 1. Balance..... 6972.50

Feb. 28. Cash..... 151.26

7123.76

Feb. 28. Invoices..... 65.15

Feb. 28. Balance..... 7058.61

[Endorsed]: Tucson Rapid Transit Company,
Monthly Statement. February 28, 1921. Mr. E. F.
Jones, Receiver.

[Endorsed]: In the District Court of the United
States, for the District of Arizona. Tucson Elec-
tric, Gas and Power Company, a Corporation,
Plaintiff, vs. Tucson Rapid Transit Company, a
Corporation, Defendant. Report of Receiver.
Filed April 4, 1921. C. R. McFall, Clerk. [114]

In the District Court of the United States, in and
for the District of Arizona.

TUCSON GAS, ELECTRIC LIGHT & POWER
COMPANY, a Corporation,

Plaintiff,

vs.

TUCSON RAPID TRANSIT COMPANY, a Cor-
poration,

Defendant,

and

ASMA RUBIAZ and THE INTERNATIONAL
TRUST COMPANY, a Corporation,

Intervenors.

Memorandum Opinion.

On February 21st, 1919, on application of the creditors, a Receiver was by this Court appointed for the property of the Transit Company and authorized to operate its street railway, which is engaged in the carrying of passengers in the city of Tucson, and the said Receiver has since said date and is now so operating the same.

On April 1st, 1920, the Intervenor Rubiaz filed a petition for intervention herein, setting forth that on the 25th day of June, 1918, prior to the appointment of said Receiver, she had recovered judgment against said Tucson Rapid Transit Company in the Superior Court in and for the County

of Pima, State of Arizona, for the sum of Four Thousand Five Hundred (\$4,500.00) Dollars, and costs of suit; that said Receiver then had in his hands certain funds realized by him from the operation of said street railway, and praying that same be impounded for her benefit and applied on said judgment.

On April 26th, 1920, the International Trust Company filed herein a petition in intervention in which petition it was alleged that on March 15th, 1906, the said Transit Company executed its mortgage or deed of trust, payable to the said International Trust Company, on all property, real, personal and mixed that it then had or might [115] thereafter acquire, to secure the payment of a certain bonded indebtedness. That thereafter bonds of the said Transit Company in the sum of One Hundred Fourteen Thousand Eight Hundred (\$114,800.00) Dollars were duly issued and delivered to said intervenor and that said bonds, together with the interest thereon, are still outstanding and unpaid.

This mortgage was duly filed for record in the office of the County Recorder of Pima County, Arizona, as a real estate mortgage but was not executed, acknowledged or recorded as a chattel mortgage.

Said intervenor also prayed that all moneys in the hands of said Receiver, received by him as aforesaid, be impounded for its benefit and paid on its said mortgage.

Equity Rule 37 provides that:

“anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be insubordination to, and in recognition of, the propriety of the main proceeding.”

Therefore, both of the intervenors have recognized the propriety of the original proceeding herein and both are (2) bound thereby.

I think it clear that neither of the intervenors had any lien on the money in the hands of the Receiver merely because they had a lien on the real and personal property of the Transit Company, and neither had any right to the money until a petition was filed herein praying that same be impounded for the payment of such liens.

In my opinion the lien of a mortgage executed and recorded in 1906, although not recorded as a chattel mortgage, was and is superior to the judgment lien rendered in 1918.

The Federal Courts have uniformly held that:

“The property essential to the operation of a railroad, including the right of way, roadbed, ties, rails, side-tracks, switches, depots, station-houses, water-tanks and other fixtures, together with the rolling-stock and other necessary movable appliances, are real estate.”

Jones on Mortgages, Seventh Edition, Section 452. [116]

This being so, it was unnecessary that such mortgage should have been recorded as a chattel mort-

gage, and although the mortgage was a superior lien on the Transit Company's real and personal property to the lien of the judgment, neither had a lien on the moneys realized by the Receiver from the operation of the street railway.

As above stated, the Intervenor Rubiaz, on April 11th, 1920, filed her petition to have the net proceeds of the operation of the street railway company impounded for the payment of her judgment lien. The trust company did not file its petition to have the said moneys impounded until (3) April 26th, 1920. Thus the Intervenor Rubiaz became entitled to the said moneys so received from the operation of the property, over and above operating expenses, from the date of filing her petition to the date of the filing of the petition by the Trust Company, and an order has heretofore been entered directing that the Receiver pay to the said Intervenor Rubiaz the sum of Nine Hundred Sixty and 5/100 (\$960.05) Dollars.

It is my opinion that neither of the intervenors is entitled to receive the net proceeds of the operation of said street railway company prior to April 1, 1920, and that the net proceeds of the operation of said street railway company after April 26th, 1920, should be applied on said mortgage debt upon a foreclosure thereof, in the event there is a foreclosure. In the event the mortgage is not foreclosed, this Court reserves the right to apply such amount of the net proceeds of the operation of said

street railway company as may not be necessary for the operation and the preservation of the property in the hands of the Receiver to the payment of the said judgment lien.

It appearing to the Court from the report of the Receiver herein that at the time the Mayor and Common Council of the City of Tucson, Arizona, granted said Tucson Rapid Transit a franchise to operate its line of street railway over the streets of the city of Tucson, Arizona, it was provided that in the event any of the streets so used by the said street railway company were paved the said street railway company [117] should pave the streets between the rails thereof, (4), and for one foot on each side of the rails, and

It further appearing that recently North Stone Avenue, between the Southern Pacific Company's right of way on Stone Avenue and Third Street, a distance of approximately four blocks, was paved in accordance with law and under the direction of said Council, and

It further appearing that on December 1st the said Mayor and Common Council of the city of Tucson notified the said Tucson Rapid Transit Company, the owner of said street railway company, to pave said Stone Avenue, between the rails thereof and for one foot on each side of such rails, on North Stone Avenue, between said railway tracks and Third Street, and that it is necessary and proper that said work be done in order to preserve

the franchise of the said Tucson Rapid Transit Company,—

IT IS ORDERED AND DECREED that the Receiver herein be and is hereby authorized to advertise for bids for the paving of said Stone Avenue, as in said ordinance and franchise provided, and submit the said bids to the Court for approval or rejection, and if any such bid is approved by the Court, the said Receiver be authorized to enter into a contract for the doing of such work and the same be paid for out of the moneys now in his hands not otherwise necessary for the operation of the said street railway.

IT IS FURTHER ORDERED that said contract be submitted to and approved by this Court before the same shall become binding upon the said Receiver.

Dated at Tucson, Arizona, this 14th day of April, 1921.

WM. H. SAWTELLE,
Judge.

[Endorsed]: Equity—70. The Tucson Gas, Electric Light & Power Company, a Corporation, Plaintiff, vs. Tucson Rapid Transit Company, a Corporation, Defendant, and Asma Rubiaz and the International Trust Company, a Corporation, Interveners. Memorandum Opinion. Filed Apr. 18, 1921. C. R. McFall, Clerk. By D. H. McFarland, Deputy. [118]

In the District Court of the United States, in and
for the District of Arizona.

E.—70.

TUCSON GAS, ELECTRIC LIGHT & POWER
COMPANY, a Corporation,

Plaintiff,

vs.

TUCSON RAPID TRANSIT COMPANY, a Cor-
poration,

Defendant,

and

ASMA RUBIAZ and THE INTERNATIONAL
TRUST COMPANY, a Corporation,

Intervenors.

**Affidavit of A. T. Smith of Service of Copies of
Certain Papers.**

State of Arizona,

County of Pima,—ss.

A. T. Smith, of lawful age, being first duly sworn,
deposes and says: That on, to wit, the 26th day of
April, 1921, at about the hour of 11:40 A. M. of
said day at and within the city of Tucson, County
of Pima, State of Arizona, at and within the office
of Kingan, Campbell & Connor, attorneys at law
and counsel for Tucson Gas, Electric Light & Power
Company, a corporation, plaintiff, in the above-
entitled action, and for The International Trust

Company, a corporation, intervenor in said above-entitled action, affiant on behalf of Asma Rubiaz, intervenor in the above-entitled cause, presented to a stenographer duly employed and in the service of said Kingan, Campbell & Connor, two copies of the attached and foregoing original "Answer of Asma Rubiaz, intervenor, to the complaint in intervention of The International Trust Company," and requested of said stenographer acknowledgment of service of copies of said answer of said Rubiaz; that thereupon said stenographer informed affiant that Mr. Connor, a member of said firm, was present and that affiant should serve said copies on said Connor; that immediately thereafter as affiant was leaving said office he met the said Connor in the hall of the building occupied by said law firm of Kingan, Campbell & Connor, and presented to said Connor as one of the members of said firm said original answer of Asma Rubiaz [119] aforesaid together with two copies of said answer and requested acknowledgment of service of copies of said answer on said Tucson Gas, Electric Light & Power Company, a corporation, plaintiff, and said The International Trust Company, a corporation, intervenor, in the above-entitled cause; that said Connor thereupon stated to affiant that he did not know exactly who the firm of Kingan, Campbell & Connor represented in said cause and refused to acknowledge service of said copies of said answer, and thereupon requested affiant to return to

said office of Kingan, Campbell & Connor later in the day; that meanwhile he, the said Connor, would examine the records of the Clerk of the United States District Court in and for the District of Arizona, and ascertain whether or not said firm represented said parties so attempted to be served with said answer (1) as aforesaid, and directed affiant to return after lunch when he, the said Conner, would take the matter up with him, affiant; that thereafter at 1:30 P. M. of said 26th day of April, 1921, affiant, in compliance with direction of said Connor, presented himself at the law offices of said Kingan, Campbell & Conner with said original answer and the two copies thereof, and requested the acknowledgment of service of copies of said answer, whereupon affiant was informed by a stenographer regularly employed in said law office of Kingan, Campbell & Conner that the said Conner had just previously left said law office and that she, the said stenographer, would acknowledge service of said copies of said answer; that thereupon said first stenographer above mentioned informed said last-mentioned stenographer in substance "that is the paper that Mr. Conner refused to sign for," whereupon said second stenographer stated in substance, "Well, if Mr. Conner refused to sign for it I cannot sign for it"; whereupon affiant left said copies of said answer with said second stenographer above mentioned and makes and files this affidavit as proof of service of copies of said answer above

mentioned on the attorneys of said Tucson Gas, Electric Light & Power Company, plaintiff above named, and said The International Trust Company, intervenor above named.

A. T. SMITH.

Subscribed and sworn to before me this 26th day of April, 1921. [120]

My commission expires Febry. 19, 1924.

[Notarial Seal] G. H. LANGWORTHY,
Notary Public. [121]

In the District Court of the United States, in and
for the District of Arizona.

TUCSON GAS, ELECTRIC LIGHT & POWER
COMPANY, a Corporation,
Plaintiff,

vs.

TUCSON RAPID TRANSIT COMPANY, a Cor-
poration,
Defendant,

and

ASMA RUBIAZ and THE INTERNATIONAL
TRUST COMPANY, a Corporation,
Intervenors.

Answer of Asma Rubiaz, Intervenor, to the Complaint in Intervention of The International Trust Company.

Comes now Asma Rubiaz, intervenor above named, and answering the complaint in intervention of The International Trust Company, says:

I.

Intervenor Asma Rubiaz admits the allegations contained in paragraphs I and II of the complaint of Intervenor The International Trust Company.

II.

Answering paragraphs III and IV of said complaint in intervention of said The International Trust Company, Intervenor Asma Rubiaz admits that the mortgage set out in said complaint was executed and recorded as a Real Estate Mortgage, but denies that said instrument was and alleges that it was not executed and filed as a Chattel Mortgage as provided in Sec. 23, Chapter III, Title 48, running Section 3282 of the Civil Code of the Revised Statutes of the Territory of Arizona, 1901, and Sec. 4124, Chapter IV, Title 35, of the Civil Code of the Revised Statutes of Arizona, 1913, for the reason that (1) the residence of the mortgagor, Tucson Rapid Transit Company, was and is not set out in said mortgage, and even if said mortgage should be held to be a valid chattel mortgage, same was not executed until August 30th, 1918, and was not filed in the office of [122] the County Re-

corder of Pima County, Arizona, until September 4th, 1918, long after the date of the recovery of the judgment of the said Asma Rubiaz, against the said Tucson Rapid Transit Company, to wit, June 25, 1918, and for the reason that said chattel mortgage was and is void as to the said Asma Rubiaz, under the provisions of Section 4126, Chapter IV, Title 35, and Section 3634, Chapter I, Title 29, of the Civil Code of the Revised Statutes of Arizona, 1913; and in this behalf Intervenor Asma Rubiaz alleges that from the said 15th day of March, 1906, and up to the date, to wit, February 21, 1919, when the Receiver herein was appointed and took same into his possession as such Receiver, all of the property of said Tucson Rapid Transit Company was retained by and held in the possession of said Tucson Rapid Transit Company.

III.

Intervenor Asma Rubiaz admits the allegations of paragraphs V, VI, VII, VIII, of the complaint of Intervenor The International Trust Company.

IV.

Intervenor Asma Rubiaz denies that Intervenor The International Trust Company has and alleges that it has not a first prior and paramount lien upon all the property, rights, assets, moneys and all property or property rights of the said Tucson Rapid Transit Company, and denies that said The International Trust Company has and alleges that it has not "the right, in order to preserve and pro-

tect the said property of the said mortgagor, to have any of the property or assets of the said Tucson Rapid Transit Company that may be necessary used for the protection and preservation of said property as a whole or in part.” (2)

V.

Intervenor Asma Rubiaz denies that Intervenor The International Trust Company has and alleges that it has not “the right to have the funds now in the hands of the Receiver, and all funds that may come into his hands, over and above the necessary expenses of operation and the expense of said receivership, paid upon the * * * indebtedness to it,” and denies that said The International Trust Company has and alleges that it has not “an equitable, first and prior lien upon all funds in the hands of said Receiver derived from the operation of said [123] property” of said Tucson Rapid Transit Company.

WHEREFORE, Intervenor Asma Rubiaz prays judgment and an order of the Honorable Court above named conferring the judgment of the said Intervenor Asma Rubiaz as set out in her complaint in intervention herein, as a first and prior lien on the moneys and other personal property of Tucson Rapid Transit Company now in the hands of the Receiver herein, and for a further order that said lien and claim of Intervenor Asma Rubiaz be immediately paid by said Receiver, and for such further orders and judgment as may seem to the

Honorable Court equitable, proper and necessary in the premises.

MOORE & FRAWLEY,
RICHEY & RICHEY,

Attorneys for Intervenor Asma Rubiaz.

State of Arizona,
County of Pima,—ss.

Asma Rubiaz, being first duly sworn, deposes and says: That she is the identical Asma Rubiaz who is one of the intervenors in the above-entitled suit; that she has read the above and (3) foregoing answer to the complaint in intervention of the International Trust Company, and knows the contents thereof, and that the same is true in substance and in fact, except as to those matters stated on information and belief, and as to those matters she believes it to be true.

ASMA RUBIAZ.

Subscribed and sworn to before me this 26th day of April, 1921.

[Notarial Seal]

A. T. SMITH,

Notary Public.

My commission expires May 12th, 1924.

[Endorsed]: In the District Court of the United States, in and for the District of Arizona. Tucson Gas, Electric Light & Power Company, a Corporation, Plaintiff, vs. Tucson Rapid Transit Company, a Corporation, Defendant, and Asma Rubiaz and The International Trust Company, a Corporation,

Intervenors. E.-70. Answer of Asma Rubaiz, Intervenor, to the Complaint in Intervention of The International Trust Company. Service of copy of the within acknowledged this — day of April, 1921. Tucson Gas, Electric Light & Power Company. By ———, Its Attorneys. Tucson Rapid Transit Company. By Geo. O. Hilzinger, Its Attorney. The International Trust Company. By ———, Its Attorneys. Edwin F. Jones, Receiver. Moore & Frawley and Richey & Richey, Attys. for [124] Intervenor Asma Rubaiz. Filed Apr. 26, 1921. C. R. McFall, Clerk. By D. H. McFarland, Deputy. [125]

In the District Court of the United States, in and
for the District of Arizona.

E.—70.

TUCSON GAS, ELECTRIC LIGHT & POWER
COMPANY, a Corporation,

Plaintiff,

vs.

TUCSON RAPID TRANSIT COMPANY, a Corporation,

Defendant,

and

ASMA RUBIAZ and THE INTERNATIONAL
TRUST COMPANY, a Corporation,

Intervenors.

Exceptions of Intervenor Asma Rubiaz to Rulings of Court in Decree.

This day the Court hands down its memorandum opinion in the above-entitled cause; and now comes Asma Rubiaz, intervenor, by her counsel, Messrs. Moore & Frawley and Messrs. Richey & Richey, and except to said statements, findings, orders and decrees therein set forth and contained in the following, to wit:

1st. "I think it clear that neither of the intervenors had any lien on the money in the hands of the Receiver merely because they had a lien on the real and personal property of the Transit Company, and neither had any right to the money until a petition was filed herein praying that same be impounded for the payment of such liens."

for the reason that said money in the hands of the Receiver was personal property of Tucson Rapid Transit Company and as such was subject to the lien of said Rubiaz as set forth and claimed in her complaint herein, and for the further reason that any debt owed to said receiver by any bank or depository by reason of the (1) deposit of said earnings of said company was "property" and a property right of said company and said receiver, and as such subject to the lien of Intervenor Asma Rubiaz.

2d. "In my opinion the lien of a mortgage executed and recorded in 1906, although not recorded as a chattel mortgage, was and is superior to the judgment lien rendered in 1918. [126]

The Federal Courts have uniformly held that: 'The property essential to the operation of a railroad, including the right of way, road-bed, ties, rails, side-tracks, switches, depots, station-houses, water-tanks and other fixtures, together with the rolling stock and other necessary movable appliances, are real estate.'

Jones on Mortgages, Seventh Edition, Section 452.

This being so it was unnecessary that such mortgagee should have been recorded as a chattel mortgage, and although the mortgage was a superior lien on the Transit Company's real and personal property to the lien of the judgment, neither had a lien on the moneys realized by the Receiver from the operation of the street railway."

for the reason that said money in the hands of the receiver was personal property of Tucson Rapid Transit Company and as such was subject to the lien of the said Rubiaz as set forth and claimed in her complaint herein, and for the further reason that any debt owed to said receiver by any bank or depository by reason of the deposit of said earnings of said company was "property" and a prop-

erty right of said company and said receiver, and as such subject to the lien of Intervenor Asma Rubiaz.

3d. "It is my opinion that neither of the intervenors is entitled to receive the net proceeds of the operation of said street railway company after April 26th, 1920, should be applied on said mortgage debt upon a foreclosure thereof, in the event there is a foreclosure."

for the reason that said money in the hands of the Receiver was personal property of Tucson Rapid Transit Company and as such was subject to the lien of said Rubiaz as set forth and claimed in her complaint herein, and for the further reason that any debt owed to said Receiver by any bank or depository by reason of the deposit of said earnings of said company was "property" and a property right of said company and said Receiver, and as such subject to the lien of Intervenor Asma Rubiaz, and was subject to (2) her application and petition for payment of her debt against said Tucson Rapid Transit Company, was subject to no claim or [127] lien of said Intervenor The International Trust Company, Intervenor, or of Tucson Gas, Electric Light & Power Company (which did not pray that same be applied to the payment of any part of the claim it had against said Tucson Rapid Transit Company), and should have been applied to the payment of the debt due from Tucson Rapid

Transit Company to said Rubiaz under her claim, petition and prayer for application of a portion of said money to the liquidation of her claim and demand against said Tucson Rapid Transit Company.

4th. IT FURTHER APPEARING that recently North Stone Avenue, between the Southern Pacific Company's right of way on Stone Avenue and Third Street, a distance of approximately four blocks, was paved in accordance with law and under the direction of said council, and

IT FURTHER APPEARING that in December 1st the said Mayor and Common Council of the City of Tucson notified the said Tucson Rapid Transit Company, the owner, to pave said Stone Avenue, between the rails thereof and for one foot on each side of such rails, on North Stone Avenue, between said railway tracks and Third Street, and that it is necessary and proper that said work be done in order to preserve the franchise of the said Tucson Rapid Transit Company."

for the reason that no threat has been made by the Mayor and Common Council of the City of Tucson, Arizona, and nothing appears in the records of this action that said Mayor and Common Council will enforce or attempt to enforce the provisions of said franchise as to said forfeiture and for the further reason that there is not provision of law

authorizing or permitting the funds accumulated by the Receiver for said Transit Company to be used to further secure or to enhance the security of said The International Trust Company, Intervenor, The International Trust Company, mortgagee, or for the purpose to which said sum is devoted by reason of said memorandum opinion, order and decree, under the conditions and pleadings in this case. (3)

5th. "IT IS ORDERED AND DECREED that the Receiver herein be, and is hereby authorized to advertise for bids for the paving of the said Stone Avenue, as in said ordinance and franchise [128] provided, and submit the said bids to the Court for approval or rejection, and if such bid is approved by the Court, the said Receiver be authorized to enter into a contract for the doing of such work and the same be paid for out of the moneys now in his hands not otherwise necessary for the operation of the said street railway."

for the reason that the carrying out of such order and decree would absolutely and definitely destroy and render valueless any and all claims, demands, liens or contentions made, urged and sought to be enforced by Intervenor Rubaiz, and there is no authority in law and no foundation of fact to support or sustain such order and decree.

All of above exceptions duly made and allowed this 16th day of April, 1921.

WM. H. SAWTELLE,

Judge.

[Endorsed]: In the District Court of the United States, in and for the District of Arizona. Tucson Gas, Electric Light & Power Company, a Corporation, Plaintiff, vs. Tucson Rapid Transit Company, a Corporation, Defendant, and Asma Rubiaz and The International Trust Company, a Corporation, Intervenor. Exceptions by Intervenor Asma Rubiaz to Memorandum Opinion. Filed May 2, 1921. C. R. McFall, Clerk. By D. H. McFarland, Deputy. [129]

In the District Court of the United States, in and
for the District of Arizona.

IN EQUITY—No. E.—70.

(Tucson.)

THE TUCSON GAS, ELECTRIC LIGHT &
POWER COMPANY, a Corporation,
Plaintiff,

vs.

TUCSON RAPID TRANSIT COMPANY, a Cor-
poration,

Defendant,

and

ASMA RUBAIZ and THE INTERNATIONAL
TRUST COMPANY, a Corporation,
Intervenor.

Assignment of Errors by Asma Rubaiz, Intervenor.

Now comes the Intervenor, Asma Rubiaz, in the above-entitled cause and having asked for an allowance of an appeal from the decree herein against her, files the following assignment of errors upon which she will rely upon her prosecution of the appeal in the above-entitled cause from the decree made by this Honorable Court on the 14th day of April, 1921.

I.

That the Court erred in finding the law against this intervening petitioner.

II.

That on the facts shown by the pleadings, records and documents in this case this intervening petitioner is entitled to a finding and decree in her favor; whereas the Court found as a matter of law against her.

III.

That the finding and decree of the Court are against the law and equity of the case and against the facts and contrary to the same.

IV.

That the Court erred in holding that this intervening petitioner did not have a lien on the net income in the hands of the receiver by virtue of the intervening petitioner's judgment and the laws of the State of Arizona.

V. [130]

That the Court erred in finding that the filing of the petition in intervention by said Asma Rubiaz did not create a lien, in favor of said intervenor, on said net income then in the hands of said receiver.

VI.

That the Court erred in not directing the receiver to pay over to said intervening petitioner an amount sufficient to satisfy her claim in accordance with the prayer of her petition in intervention.

VII.

That the Court erred in ordering a diversion of the net income in the hands of the receiver from the payment of said intervening petitioner's claim.

WHEREFORE, the intervening petitioner prays that the finding and decree of the Court against her be reversed and that said District Court be ordered to enter a decree directing the payment to intervenor Asma Rubaiz as prayed for in her intervening petition filed in this action.

RICHEY & RICHEY,

MOORE & FRAWLEY,

Attorneys for Intervenor, Asma Rubaiz. (2)

[Endorsed]: In Equity (Tucson) No. E.—70.
District Court of the United States for the District of Arizona. The Tucson Gas, Electric Light & Power Company, a Corporation, Plaintiff, vs. Tucson Rapid Transit Company, a Corporation, De-

fendant, and Asma Rubaiz and the International Trust Company, a Corporation, Intervenor. Assignment of Errors by Asma Rubaiz, Intervenor. Filed Sep. 7, 1921. C. R. McFall, Clerk. [131]

In the District Court of the United States, in and
for the District of Arizona.

IN EQUITY—No. E.—70.

(Tucson.)

THE TUCSON GAS, ELECTRIC LIGHT &
POWER COMPANY, a Corporation,
Plaintiff,

vs.

TUCSON RAPID TRANSIT COMPANY, a Corporation,
Defendant,

and

ASMA RUBAIZ and THE INTERNATIONAL
TRUST COMPANY, a Corporation,
Intervenor.

Petition for Appeal.

To the Honorable WILLIAM H. SAWTELLE,
Judge of the District Court of the United
States in and for the District of Arizona:

The above-named Asma Rubaiz feeling aggrieved
by the decree rendered and entered in the above-
entitled cause on the 14th day of April, A. D. 1921,

does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of errors filed herewith, and she prays that her appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based duly authenticated be sent to the United States Circuit Court of Appeals for the Ninth Circuit under the rules of such court in such cases made and provided.

And your petitioner further prays that the proper order relating to required security to be required by her be made.

RICHEY & RICHEY,
MOORE & FRAWLEY,

Attorneys for Intervenor Asma Rubiaz.

The foregoing petition of appeals is allowed and bond as required by law shall be given in the sum of \$500.00.

This 30th August, 1921.

WM. H. SAWTELLE,
Judge.

[Endorsed]: [132] In Equity (Tucson)—No. E.—70. District Court of the United States for the District of Arizona. The Tucson Gas, Electric Light & Power Company, a Corporation, Plaintiff, vs. Tucson Rapid Transit Company, a Corporation, Defendant, and Asma Rubiaz and the International Trust Company, a Corporation, Intervenors. Peti-

tion for Appeal. Filed Sept. 7, 1921. C. R. McFall, Clerk. [133]

In the District Court of the United States in and
for the District of Arizona.

E.-70—TUCSON.

TUCSON GAS, ELECTRIC LIGHT & POWER
COMPANY, a Corporation,

Plaintiff,

vs.

TUCSON RAPID TRANSIT COMPANY, a Corporation,

Defendant,

and

ASMA RUBIAZ and THE INTERNATIONAL
TRUST COMPANY, a Corporation,

Intervenors.

Citation on Appeal (Copy).

The United States of America,—ss.

To The Tucson Gas, Electric Light & Power Company, and Messrs. Kingan & Campbell, Its Attorneys,

To Tucson Rapid Transit Company and George G. Hilzinger, Its Attorney,

To The International Trust Company, and Messrs. Kingan & Campbell, Its Attorneys, and

To Edwin F. Jones, Receiver, Tucson, Arizona,
GREETING:

You and each of you, are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco in the State of California, on the 26th day of October, 1921, pursuant to an order allowing an appeal filed and entered in the clerk's office of the District Court of the United States for the District of Arizona, from a final decree, signed, filed, and entered on the 14th day of April, 1921, in that certain suit, being In Equity No. E.—70, wherein Asma Rubiaz, Appellant, is intervenor, and Appellee Tucson Gas, Electric Light & Power Company is Plaintiff, and Appellee Tucson Rapid Transit Company is defendant, and Appellee The International Trust Company, is intervenor, and Appellee Edwin F. Jones is Receiver, to show cause, if any there be, why the decree rendered against the said appellant, as in said order allowing appeal mentioned, should [134] not be corrected and why justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM H. SAWTELLE, United States District Judge for the District of Arizona, this 26th day of September, 1921, and of the Independence of the United States one hundred forty-six.

WM. H. SAWTELLE,
United States District Judge for the District of
Arizona. (2)

[Endorsed]: No. E.-70—Tucson. District Court of the United States for the District of Arizona. Tucson Gas, Electric Light & Power Company, a Corporation, Plaintiff, vs. Tucson Rapid Transit Company, a Corporation, Defendant, and Asma Rubiaz and the International Trust Company, a Corporation, Intervenors. Citation on Appeal. Filed Sep. 26, 1921. C. R. McFall, Clerk. By Preston Turner, Deputy.

I hereby, this 26th day of September, 1921, accept due personal service of this citation on behalf of Tucson Gas, Electric Light & Power Company and International Trust Company, Appellees.

KINGAN, CAMPBELL & CONNOR,
Attorneys for Said Appellees.

I hereby, this 26th day of September, 1921, accept due personal service of this citation on behalf of Tucson Rapid Transit Company, Appellee.

GEO. O. HILZINGER,
Attorney for Said Appellee. (B)

I hereby, this 26th day of September, 1921, accept due personal service of this citation.

EDWIN F. JONES,
Receiver. (B) [135]

In the District Court of the United States in and
for the District of Arizona.

E.-70—TUCSON.

TUCSON GAS, ELECTRIC LIGHT & POWER
COMPANY, a Corporation,

Plaintiff,

vs.

TUCSON RAPID TRANSIT COMPANY, a Cor-
poration,

Defendant,

and

ASMA RUBAIZ and THE INTERNATIONAL
TRUST COMPANY, a Corporation,

Intervenors.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That we, Asma Rubaiz, as principal, and John Nel-
son and N. J. King, as sureties, of the County of
Pima, State of Arizona, are held and firmly bound
unto Tucson Rapid Transit Company, a corpora-
tion, Tucson Gas, Electric Light & Power Com-
pany, a corporation, The International Trust Com-
pany, a corporation, and Edwin F. Jones, Receiver,
in the sum of Five Hundred (\$500.00) Dollars, law-
ful money of the United States of America, to be
paid to them and their respective executors, ad-

ministrators, successors and assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors, and administrators, by these presents.

Sealed with our seals and dated this 23d day of September, 1921.

WHEREAS, the above-named Asma Rubaiz has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment of the United States District Court for the District of Arizona, in the above-entitled cause:

Now, therefore, the condition of this obligation is such that if the above-named Asma Rubaiz shall prosecute her said appeal to effect and answer her costs if she fails to make good her plea then this obligation shall be void; otherwise to remain in full force and effect.

ASMA RUBAIZ,

By E. B. FRAWLEY,

Agent,

JOHN NELSON,

M. J. KING. [136]

State of Arizona,

County of Pima,—ss.

On the 23d day of September, 1921, personally appeared before me John Nelson and N. J. King, respectively known to me to be the persons described in and who duly executed the foregoing

instrument as parties thereto and respectively acknowledged each for himself and not one for the other, that they executed the same as their free act and deed for the purposes therein set forth.

And the said John Nelson and M. J. King being respectively by me duly sworn, says, each for himself and not one for the other that he is a resident and property holder of the said county of Pima, State of Arizona, and that he is worth the sum of Five Hundred (\$500.00) Dollars over and above his just debts and legal liability and property exempted from execution.

JOHN NELSON.

M. J. KING.

Subscribed and sworn to before me this 23d day of September, 1921, by John Nelson and M. J. King.

[Seal]

A. T. SMITH,
Notary Public.

My commission expires May 12, 1924.

The within bond is approved both as to sufficiency and form this 26th day of September, 1921.

WM. H. SAWTELLE,
United States District Judge for the District of
Arizona.

[Endorsed]: No. E.-70—Tucson. District Court of the United States, for the District of Arizona, Tucson Gas, Electric Light & Power Company, a Corporation, Plaintiff, vs. Tucson Rapid Transit Company, a corporation, Defendant, and Asma

Rubaiz and The International Trust Company, a Corporation, Intervenor. Bond on Appeal. Filed Sep. 26, 1921. C. R. McFall, Clerk. By Preston Turner, Deputy. [137]

In the District Court of the United States in and
for the District of Arizona.

E.-70—TUCSON.

At a regular term, to wit, the November, 1919, term, of said court, held at the courtroom of said court in the City of Tucson, State and District of Arizona, on Monday, the 5th day of April, 1920—Honorable WILLIAM H. SAWTELLE, Presiding.

(Minute Entry April 5, 1920.)

THE TUCSON GAS, ELECTRIC LIGHT &
POWER COMPANY, a Corporation,
Plaintiff,

vs.

TUCSON RAPID TRANSIT COMPANY, a Corporation,
Defendant.

**Minutes of Court—April 5, 1920—Order Allowing
Asma Rubaiz to File Petition, etc.**

IT IS ORDERED, that the petitioner herein, Asma Rubiaz, be and she is hereby allowed to file

petition herein to recover judgment in the State Court.

AND IT IS FURTHER ORDERED, that all adverse parties be allowed twenty days within which to file answer and other pleadings to such petition.
[138]

In the District Court of the United States in and
for the District of Arizona.

E.-70—TUCSON.

At a regular term, to wit, the November, 1920, term of the District Court of the United States for the District of Arizona, held at the court-rooms of said court in the City of Tucson, State and District of Arizona, on Thursday, the 14th day of April, A. D. 1921—Honorable WILLIAM H. SAWTELLE, Presiding.

(Minute Entry April 14th, 1921.)

TUCSON GAS, ELECTRIC LIGHT & POWER
COMPANY, a Corporation,

Plaintiff,

vs.

TUCSON RAPID TRANSIT COMPANY, a Corporation,

Defendant,

and

ASMA RUBIAZ and THE INTERNATIONAL
TRUST COMPANY, a Corporation,

Intervenors.

**Minutes of Court—April 14, 1921—Exception of
Asma Rubaiz to Adverse Rulings of Court.**

Comes now Messrs. Richey & Richey, Solicitors for the Intervenor, Asma Rubiaz, and duly note exception of the said petitioner to the adverse rulings of the Court contained in the decree this day rendered by the Court in this cause. [139]

In the District Court of the United States for the
District of Arizona.

E.-70—TUCSON.

At a regular term, to wit, the May, 1921, term of said court, held at the courtrooms of said court in the City of Tucson, State and District of Arizona, on Tuesday, the 30th day of August, A. D. 1921—Honorable WILLIAM H. SAWTELLE, Presiding.

(Minute Entry August 30, 1921.)

TUCSON GAS, ELECTRIC LIGHT & POWER
COMPANY, a Corporation,

Plaintiff,

vs.

TUCSON RAPID TRANSIT COMPANY, a Corporation,

Defendant.

**Minutes of Court—August 30, 1921—Order Allowing
Appeal and Fixing Amount of Bond.**

It is ordered that the petition of the Intervenor herein, Asma Rubiaz, for an order allowing an appeal to the Circuit Court of Appeals for the 9th Circuit at San Francisco, from a decree rendered by this Court in the above-entitled cause on the 14th day of April, 1921, be and the same is hereby granted, and said appeal allowed upon the giving of bond by said petitioner as required by law, in the sum of Five Hundred Dollars (\$500.00). [140]

In the District Court of the United States for the
District of Arizona.

E.-70—TUCSON.

At a regular term, to wit, the November, 1919, term of said court, held at the courtrooms of said court in the City of Tucson, State and District of Arizona, on Thursday, the 29th day of April, A. D. 1920—Honorable WILLIAM H. SAWTELLE, Presiding.

(Minute Entry of April 29th, 1920.)

TUCSON GAS, ELECTRIC LIGHT & POWER
COMPANY, a Corporation,

Plaintiff,

vs.

TUCSON RAPID TRANSIT COMPANY, a Cor-
poration,

Defendant.

**Minutes of Court—April 29, 1920—Order Allowing
International Trust Company Leave to Inter-
vene.**

The matter of the application of International Trust Company for leave to intervene coming on for hearing this day, no objection being made thereto,—

IT IS ORDERED: That the petition be and the same is hereby granted, and the said International Trust Company is allowed to intervene in this cause. [141]

In the District Court of the United States in and
for the District of Arizona.

E.-70—TUCSON.

TUCSON GAS, ELECTRIC LIGHT & POWER
COMPANY, a Corporation,

Plaintiff,

vs.

TUCSON RAPID TRANSIT COMPANY, a Cor-
poration,

Defendant,

and

ASMA RUBIAZ and THE INTERNATIONAL
TRUST COMPANY, a Corporation,

Intervenors.

**Praeipie of Portions of Record to be Incorporated
into Transcript on Appeal.**

To the Clerk of the District Court of the United
States, in and for the District of Arizona:

Notice is hereby given by Asma Rubiaz, inter-
venor and appellant, that she deems the following
papers and portions of the record necessary to
present the questions involved on appeal to the
United States Court of Appeals for the Ninth Cir-
cuit, and request is hereby made that you forward
to said last-mentioned court the following parts of
said record as your transcript on appeal:

1. Complaint.
2. Answer.
3. Order appointing Receiver.
4. All reports of Receiver.
5. Notice of motion to intervene and intervening petition of appellant Asma Rubiaz.
6. Order granting Asma Rubiaz petition to intervene.
7. Notice of motion of International Trust Company to intervene.
8. Petition in intervention of International Trust Company.
9. Answer of Tucson Gas, Electric Light and Power Company to intervening petition of Asma Rubiaz. [142]
10. Answer of Receiver to intervening petition of Asma Rubiaz.
11. Answer of Tucson Rapid Transit Company to intervening petition of Asma Rubiaz.
12. Order granting International Trust Company permission to intervene.
13. Answer of Receiver to intervening petition of International Trust Company.
14. Notice of motion and motion of Asma Rubiaz to dismiss complaint of International Trust Company, to strike out answer of Tucson Rapid Transit Company, and to strike out answer of Tucson Gas, Electric Light & Power Company.

15. Order to Receiver to make partial payment to Asma Rubiaz.
16. Memorandum opinion of Judge Sawtelle dated April 14, 1921.
17. Answer of Asma Rubiaz to complaint in intervention of International Trust Company.
18. Exceptions of Asma Rubiaz to memorandum opinion.
19. Petition for appeal of Asma Rubiaz.
20. Assignment of errors of Asma Rubiaz.
21. Bond on appeal.
22. Citation on appeal.
23. And all other papers, records and minute entries in said case save and excepting Receiver's bond, order fixing compensation of Receiver, and briefs of counsel.

RICHEY & RICHEY,
MOORE & FRAWLEY,

Attorneys for Intervenor and Appellant, Asma Rubiaz.

[Endorsed]: No. E.—70 (Tucson). In the District Court of the United States, in and for the District of Arizona. Tucson Gas, Electric Light & Power Company, a Corporation, vs. Tucson Rapid Transit Company, a Corporation, Defendant, and Asma Rubiaz and The International Trust Company, a Corporation, Intervenors. Praecipe of portions of record to be incorporated into Transcript on Appeal. Filed Sep. 26, 1921. C. R. McFall, Clerk. By Preston Turner, Deputy. [143]

Copy of within praecipe received this 26th day of September, 1921.

KINGAN, CAMPBELL & CONNOR,
Attorneys for Tucson Gas, Electric Light & Power
Co. and International Trust Company.

Copy of the within praecipe received this 26th day of September, 1921.

GEO. O. HILZINGER,
Attorney for Tucson Rapid Transit Company.

Copy of the within praecipe received this 26th day of September, 1921.

EDWIN F. JONES,
B.,
Receiver. [144]

In the District Court of the United States for the
District of Arizona.

TUCSON GAS, ELECTRIC LIGHT & POWER
COMPANY, a Corporation,
Plaintiff,

vs.

TUCSON RAPID TRANSIT COMPANY, a Cor-
poration,
Defendant,

and

ASMA RUBIAZ and THE INTERNATIONAL
TRUST COMPANY, a Corporation,
Intervenors.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the District Court of the United States for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said United States District Court for the District of Arizona, including the records, papers and files in the case of Tucson Gas, Electric Light & Power Company, a corporation, Plaintiff, vs. Tucson Rapid Transit Company, a corporation, defendant, and Asma Rubiaz and The International Trust Company, a corporation, Intervenors, said case being number Equity 70—Tucson on the docket of said court.

I further certify that the foregoing 144 pages, numbered from 1 to 144, inclusive, constitute a full, true and correct copy of the record, and of the assignment of errors and all proceedings in the above-entitled cause, as set forth in the praecipe filed in said cause and made a part of this Transcript as the same appears from the originals of record and on file in my office as such clerk.

And I further certify that there is also annexed to said Transcript the original citation issued in said cause.

I further certify that the cost of preparing and certifying to said record, amounting to Fifty and

95/100 Dollars (\$50.95), has been paid to me by the above-named Intervenor, (appellant).

WITNESS my hand and the seal of said court this 20th day of October, 1920.

[Seal]

C. R. McFALL,

Clerk of the United States District Court, District of Arizona. [145]

In the District Court of the United States, in and for the District of Arizona.

E.—70—TUCSON.

TUCSON GAS, ELECTRIC LIGHT & POWER
COMPANY, a Corporation,

Plaintiff,

vs.

TUCSON RAPID TRANSIT COMPANY, a Corporation,

Defendant,

and

ASMA RUBAIZ and THE INTERNATIONAL
TRUST COMPANY, a Corporation,

Intervenors.

Citation on Appeal (Original).

The United States of America,—ss.

To The Tucson Gas, Electric Light & Power Company, and Messrs. Kingan & Campbell, Its Attorneys,

To Tucson Rapid Transit Company, and George G.
Hilzinger, Its Attorney,
To The International Trust Company, and Messrs.
Kingan & Campbell, Its Attorneys, and
To Edwin F. Jones, Receiver, Tucson, Arizona,
GREETING:

You, and each of you, are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco, in the State of California, on the 26th day of October, 1921, pursuant to an order allowing an appeal filed and entered in the clerk's office of the District Court of the United States for the District of Arizona, from a final decree signed, filed, and entered on the 14th day of April, 1921, in that certain suit, being in Equity No. E.—70, wherein Asma Rubaiz, Appellant, is intervenor, and Appellee, Tucson Gas, Electric Light & Power Company is plaintiff, and Appellee Tucson Rapid Transit Company [146] is defendant, and appellee, the International Trust Company, is intervenor and appellee, Edwin F. Jones, is Receiver, to show cause, if any there be, why the decree rendered against the said appellant, as in said order allowing appeal mentioned, should not be corrected, and why justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM H. SAWTELLE, United States District Judge for the District of Arizona, this 26th day of September, 1921,

and of the Independence of the United States One Hundred Forty-six.

WM. H. SAWTELLE,
United States District Judge for the District of
Arizona. [147]

[Endorsed]: No. E.—70—Tucson. District Court of United States for the District of Arizona. Tucson Gas, Electric Light & Power Company, a Corporation, Plaintiff, vs. Tucson Rapid Transit Company, a Corporation, Defendant, and Asma Rubaiz and the International Trust Company, a Corporation, Intervenors. Citation on Appeal. Filed Sep. 26, 1921. C. R. McFall, Clerk. By Preston Turner, Deputy.

We hereby, this 26th day of September, 1921, accept due personal service of this citation on behalf of Tucson Gas, Electric Light & Power Company and International Trust Company, Appellees.

KINGAN, CAMPBELL & CONNER,

Attorneys for said Appellees.

I hereby, this 26th day of September, 1921, accept due personal service of this citation on behalf of Tucson Rapid Transit Company, appellee.

GEO. O. HILZINGER, B.,

Attorney for said Appellee.

I hereby, this 26th day of September, 1921, accept due personal service of this citation.

EDWIN F. JONES, B.,

Receiver.

[Endorsed]: No. 3791. United States Circuit Court of Appeals for the Ninth Circuit. Asma Rubaiz, Appellant, vs. The Tucson Gas, Electric Light and Power Company, a Corporation, Tucson Rapid Transit Company, a Corporation, The International Trust Company, a Corporation, and Edwin F. Jones, as Receiver, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Arizona.

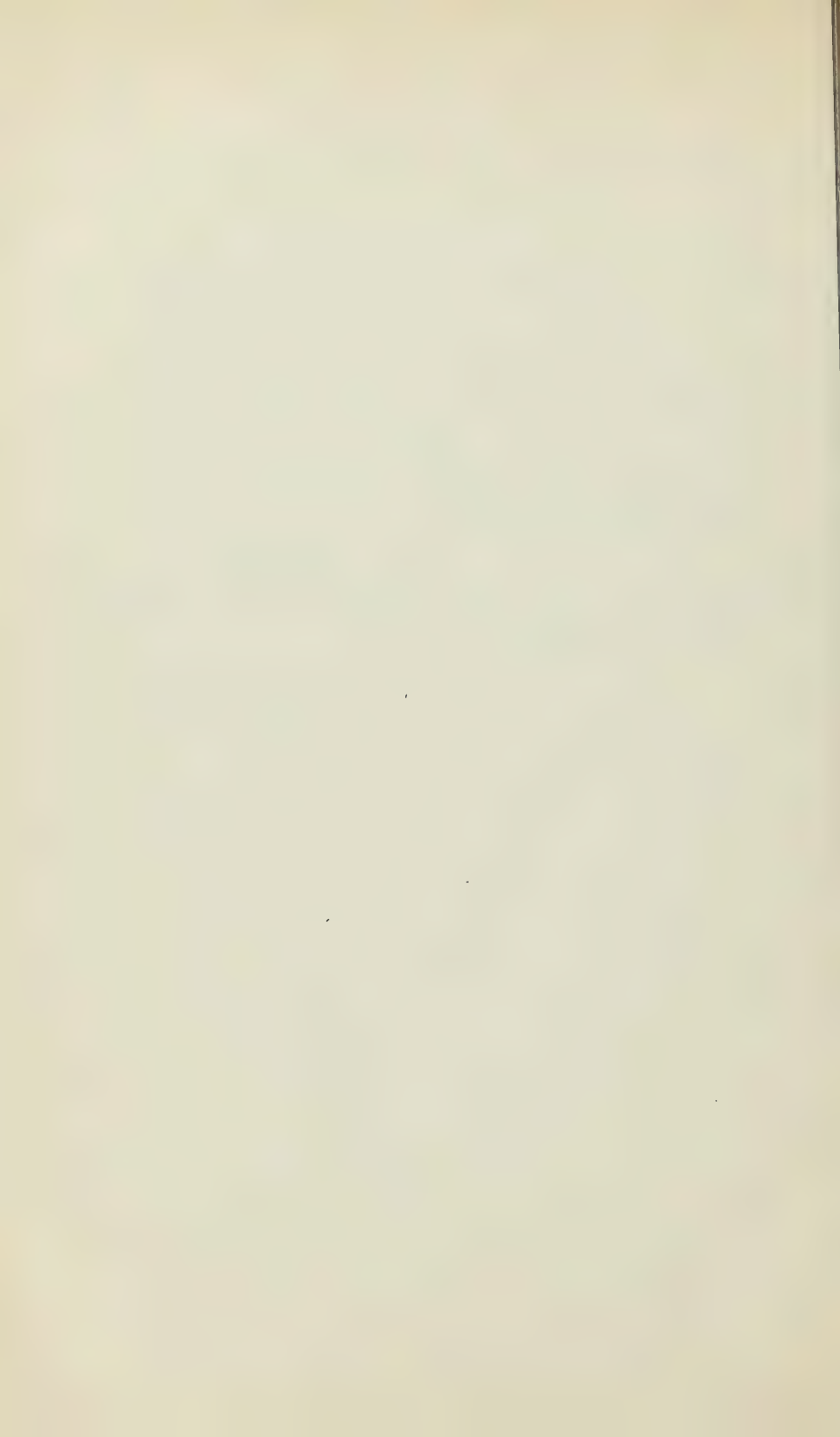
Filed October 24, 1921.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.



**United States
Circuit Court of Appeals
For the Ninth Circuit**

ASMA RUBIAZ,

Appellant,

vs.

THE TUCSON GAS, ELECTRIC LIGHT &
POWER COMPANY, a Corporation, TUCSON
RAPID TRANSIT COMPANY, a Corporation,
THE INTERNATIONAL TRUST COM-
PANY, a Corporation, and EDWIN F. JONES,
as Receiver,

Appellees.

BRIEF OF APPELLANT

Upon Appeal from the United States District Court
for the District of Arizona

Messrs RICHEY & RICHEY and Messrs. MOORE
& FRAWLEY, Tucson, Arizona,
Attorneys for Appellant.

Filed this day of January, 1922

Clerk of the United States Circuit Court of Ap-
peals, Ninth Circuit.

FILED

JAN 23 1922

F. D. MONKTON

Service of two copies of within Brief of Appellant
is hereby acknowledged this.....day of January, 1922.

.....
Attorney for Appellee, Tucson Rapid Transit
Company.

.....
Attorneys for Appellee, The International
Trust Company.

.....
Attorney for Appellee, Tucson Gas, Electric
Light & Power Company.

.....
Receiver.

**United States
Circuit Court of Appeals
For the Ninth Circuit**

ASMA RUBIAZ,

Appellant,

vs.

THE TUCSON GAS, ELECTRIC LIGHT &
POWER COMPANY, a Corporation, TUCSON
RAPID TRANSIT COMPANY, a Corporation,
THE INTERNATIONAL TRUST COM-
PANY, a Corporation, and EDWIN F. JONES,
as Receiver,

Appellees.

BRIEF OF APPELLANT

Upon Appeal from the United States District Court
for the District of Arizona

Messrs RICHEY & RICHEY and Messrs. MOORE
& FRAWLEY, Tucson, Arizona,
Attorneys for Appellant.

Filed this day of January, 1922

.....
Clerk of the United States Circuit Court of Ap-
peals, Ninth Circuit.

**United States
Circuit Court of Appeals
For the Ninth Circuit**

ASMA RUBIAZ,

Appellant,

vs.

THE TUCSON GAS, ELECTRIC LIGHT &
POWER COMPANY, a Corporation, TUCSON
RAPID TRANSIT COMPANY, a Corporation,
THE INTERNATIONAL TRUST COM-
PANY, a Corporation, and EDWIN F. JONES,
as Receiver,

Appellees.

BRIEF OF APPELLANT

STATEMENT OF CASE

(For brevity, throughout this brief the Tucson Rapid Transit Company is referred to as "Transit Company," the Tucson Gas, Electric Light & Power Company as "Light Company," and the International Trust Company as "Trustee.")

March 15, 1906, the Transit Company executed a certain deed of trust on all its property, real, personal and mixed, including income and after acquired property, to Trustee, in trust to secure an authorized issue

of \$300,000 of bonds. Under this authorization \$114,800 of bonds were issued shortly thereafter, and are now outstanding and unpaid. All bonds mature March 15, 1928, and bear interest at the rate of 6 per cent, payable semi-annually. (Transcript page 97). By the provisions of the deed of trust, if the Transit Company failed to pay any interest coupons when due and payable and such default continued for a period of 60 days, the Trustee might, in writing, notify the Transit Company of such default, and if the same continued for 30 days after the receipt of such notice, the Trustee might, at his election, enter upon and take possession of the mortgaged premises (transcript, page 67-68). Part of the first installment of interest, due August 15, 1906, was paid, and no interest has been paid since that date. (Transcript, page 98). But no action has ever been taken by any individual bondholder, nor by the Trustee, except as hereinafter stated.

This deed of trust was filed as a realty mortgage April 23rd, 1906, and fixed a lien on the realty, but was ineffectual and inoperative as to the Transit Company's personal property. Paragraph 3282 of the Revised Statutes of Arizona, 1901, in force at the date of the execution of the deed of trust, and still in force, reads as follows:

3282. (Sec. 23.) No chattel mortgage shall have any legal force or effect except as between the parties, unless the residence of the mortgagor

and mortgagee, the sum to be secured, the rate of interest to be paid, when and where payable, shall be set out in the mortgage; and the mortgagor and mortgagee shall make affidavit that the mortgage is bona fide and made without any design to defraud or delay creditors, which affidavit shall be attached to such mortgage.

The acknowledgments of good faith were not made to the deed of trust as originally filed, but on August 30, 1918, such acknowledgments were made and the instrument filed as a chattel mortgage. (Transcript, page 97).

On February 10, 1915, the Light Company loaned to the Transit Company the sum of \$25,000, on March 20, 1916, the sum of \$15,000, and on November 30, 1917, the sum of \$20,000, taking in each instance, the unsecured, demand note of the Transit Company. (Transcript, page 2). These notes bore interest at the rate of 8 per cent per annum, but no interest was ever paid thereon. (Transcript, page 6).

June 25, 1918, appellant, Asma Rubiaz, was given judgment in the Superior Court of Pima County, Arizona, against the Transit Company in the sum of \$4,552.75. This judgment was for personal injuries received by appellant while a passenger on one of the Transit Company's cars and bears interest at the rate of 6 per cent per annum from date of rendition until paid. The Transit Company appealed from this judgment to the Supreme Court of Arizona.

On February 20, 1919, and while the above case was still pending in the Supreme Court of Arizona, the Light Company instituted action against the Transit Company in the United States District Court for the District of Arizona. In its complaint it set up the deed of trust, and non-payment of interest thereunder, appellant's judgment, the execution of the demand notes, demand for payment and refusal, that the Transit Company was insolvent, and prayed judgment for the amount of said notes and interest and

That this Honorable Court take the said property of the said defendant company into its possession and that the creditors of the defendant, or any and all persons having claims or demands against said defendant, be required to present the same, and that said claims be ascertained and determined, and that the court fully administer the fund obtained and the assets of the said defendant company and that the said assets be marshalled and the respective lien or liens and priorities existing therein be ascertained and that the court enforce and decree the rights, liens and equities of all creditors or persons having claims upon or against the defendant as the same may be finally ascertained by the Court; and that for the purpose of preserving the property of the said defendant a receiver be appointed with power to collect all of the assets of the defendant company

and that authority to run and operate said street railway system and to collect and receive all moneys due and apply the income thereof under the direction of the Court and for such period as the Court may order, and that for the purpose of protecting and preserving the property of the said defendant company from being sacrificed under proceedings liable to be taken and which might prejudice the same, and that temporarily and pending the suit an injunction might issue against the defendant and all persons claiming to act by, through or under it, and all other persons, restraining them and each and all of them from interfering with the Receiver taking possession of and operating the property. And that plaintiff have such other and further relief as to the Court may seem just and proper, together with its costs in this behalf expended (Transcript, page 7-8).

On the same day the Transit Company filed its answer to this complaint, admitting all the allegations of the complaint and joining in the prayer for a Receiver, and on February 21, 1919, the Court appointed Edwin F. Jones as Receiver, with full power to take possession of, manage, operate and control "all of the property and assets of every kind and description of the said defendant, the Tucson Rapid Transit Company," and it was further ordered

That the said Receiver, out of the money which

shall come into his hands by the operation of said railroad or otherwise proceed to make payments as follows: He will pay all current expenses incident to the operation of said railroad and the administration of his trust; he shall pay all amounts now legally due or that shall hereafter become due for taxes on any of the property over which he is appointed Receiver, and any other or further funds which may come into his hands he shall hold subject to the supervision of this Court (Transcript, page 13).

Also an injunction was issued restraining interference by anyone with the Receiver's possession. The Receiver qualified at once and has continually managed and controlled the Transit Company's property and business from that time to the present.

On February 18, 1920, the Supreme Court affirmed the judgment of the lower court in appellant's action against the Transit Company, and awarded appellant costs on appeal in the amount of \$106.00 (transcript, page 39).

On April 1st, 1920, appellant, by leave of court, filed a petition in intervention in the receivership proceedings. There was, on this date, April 1, 1920, the sum of \$8,368.77 (transcript, page 144) on deposit in the Arizona National Bank of Tucson, Arizona, to the credit of the Receiver, representing the net income from the operation of the road, after deducting

payment of the costs and expenses of running the business (transcript, page 42).

In her intervening petition, after setting up her judgment and its affirmance and that there was sufficient net income in the hands of the Receiver to pay the said judgment, interest and costs, appellant prayed:

And this intervenor says said judgment is a first and prior lien on the personal property of said The Tucson Rapid Transit Company, a corporation, within the County of Pima, State of Arizona, including said sum of money in the hands of said Receiver, and prays an order of the Honorable Court conferring the same as such first and prior lien and for the further order for the immediate payment thereof by said Receiver.

And the intervenor prays for such further or other orders respecting said claim as may seem to the Honorable Court equitable, proper and necessary under the fact, and so as in duty bound will ever pray (transcript, pages 32-33).

Revised Statutes of Arizona, 1913, provides in paragraph 3634 as follows:

3634. A judgment against any railway corporation, or street railway corporation or copartnership, for an injury to any person or property, shall be a lien within the county where recovered on the property of such corporation, and such lien

shall be prior and superior to the lien of any mortgage or trust deed executed after this section takes effect.

All the property of the Transit Company is located in Pima County, Arizona.

On the 27th day of August, 1918, the holders of approximately 90 per cent of the outstanding bonds and interest coupons presented the unpaid coupons to the Trustee and demanded payment. Payment was refused, and, the default continuing for a period of 60 days, the Trustee notified the Transit Company of such default, and the Transit Company, for a period of more than 30 days after such notice, defaulted in the payment of said interest coupons and all thereof, and has not paid the same nor any part thereof.

April 27, 1920, the Trustee, under leave of court, filed its petition in intervention wherein it set up the deed of trust, non-payment of interest thereunder, except as heretofore set up, demand on Trustee by coupon holders, and notice of such demand, as set out in the preceding paragraph of this brief, and prayed:

That the lien or liens of complainant, and under and by virtue of the said indenture of trust, be declared prior and superior to any and all other claims or liens of any person whomsoever upon all of the property, rights, moneys, franchises, profits, income, and all property of what-

soever kind or description, of the said Tucson Rapid Transit Company, and that all moneys that have been derived from the operation of the property, over and above the necessary expenses of operation and the expenses of the receivership, and that may hereafter be derived from such operation, be paid unto it to apply upon the aforesaid indebtedness, and that the Receiver hold all property of defendants for complainant.

That complainant do have such other and further relief as shall be adequate, and proper and just in the premises (transcript, pages 107-108).

The answer of the Light Company to appellant's petition sets out the deed of trust, denied that appellant's lien was a first or prior lien on the personal property or the sum of money in the hands of the Receiver, or any property of the Transit Company, but that "the lien of the said deed of trust is the first and prior lien upon all the property and assets of whatever kind or character of the said" Transit Company. The answer also alleges:

* * * that the franchise of the City of Tucson granted to the Tucson Rapid Transit Company requires said company, whenever paving shall be ordered upon a street where the railroad of said company shall be operated, that said company shall pave between the rails on said street or streets, and that, in the event it shall fail so to do, its franchise shall be forfeited; that the City

of Tucson has ordered that Stone Avenue, in the said City of Tucson from the railroad tracks of the Southern Pacific Company on said Stone Avenue, north to Third Street shall be paved, and that, as plaintiff is advised and believes, the contract for the paving of said street has been let, and said paving is about to be commenced (transcript, page 106).

The prayer for relief is as follows:

WHEREFORE, plaintiff prays that the intervenor do have and recover nothing upon her complaint and petition in intervention; that the lien of the said International Trust Company be declared the first and paramount lien upon all of the property and assets of the Tucson Rapid Transit Company; that, to the end that the creditors of the Tucson Rapid Transit Company may have their rights preserved in said property, that the Receiver herein be authorized and directed to apply the moneys now in its hands to the necessary paving of the aforesaid street, that the franchise of the Tucson Rapid Transit Company be not forfeited and its assets preserved, and for such other and further relief as to the Court may seem meet and equitable in the premises (transcript, pages 107-108).

The Receiver's answer to appellant's petition requests the Court for instructions as to the disposition

of the funds in his hands, and that the Court determine the priorities.

The answer of the Transit Company to appellant's petition sets out the deed of trust, default therein and notice of default, admits the existence of appellant's judgment and that it is wholly unpaid, denies that said judgment is a prior lien on the personal property of the Transit Company or the sum in the hands of the Receiver, makes the same allegation relative to paving as contained in the Light Company's answer, and prays:

1. That the lien or liens of the International Trust Company, Trustee, under and by virtue of the said indenture of trust, be declared prior and superior to any and all other claims or liens of any person, and of the claim or lien of the said Asma Rubaiz upon all property, property rights, moneys, franchises, and all properties of whatsoever kind and description of the said defendant.

2. That the Court direct the money now in the hands of the Receiver be spent for the purpose of doing said paving in order to improve the security of the said trustee (transcript, page 125).

May 11, 1920, appellant moved to dismiss the Trustee's petition in intervention, and moved to strike the the answer of the Light Company, and the answer

of the Transit Company to her petition in intervention, stating as one of her grounds:

* * * said answer shows on its face that said The Tucson Gas, Electric Light & Power Company is colluding with the said The International Trust Company, intervenor, and Tucson Rapid Transit Company, above named defendant, to have the property and assets of said Tucson Rapid Transit Company used for the protection, preservation and enhancement of the value of the security of the mortgage of the said The International Trust Company, and to defeat the claim and lien of Intervenor Asma Rubiaz (transcript, page 140).

The Receiver's answer to the complaint in intervention of the Trustee sets up a necessity for paving and prays that the Court determine all priorities to the fund in his hands.

Neither the Transit Company nor the Light Company answered the Trustee's intervening petition.

Arguments were had and briefs submitted to the Court and on June 24, 1920, the Court directed the Receiver to pay the appellant the sum of \$960.05, this being the amount received by him from the operation of the Transit Company from April 1, 1920, to April 27, 1920; the order concludes: "further action of the Court on the matter of the Rubiaz claim in this cause will be taken under advisement." (Transcript, page

147). This sum was paid to appellant by the Receiver.

The Court had the case under advisement from the last mentioned date until the 14th day of April, 1921, when the memorandum opinion was handed down denying appellant's right to any funds in the hands of the Receiver and directing that the money be used in paving between the rails, and it is from this order that appellant prosecutes her appeal.

SPECIFICATION OF ERROR

I

That the Court erred in finding the law against this intervening petitioner.

II

That on the facts shown by the pleadings, records and documents in this case this intervening petitioner is entitled to a finding and decree in her favor; whereas the Court found as a matter of law against her.

III

That the finding and decree of the Court are against the law and equity of the case and against the facts and contrary to the same.

IV

That the Court erred in holding that this intervening petitioner did not have a lien on the net income in the hands of the Receiver, by virtue of the interven-

ing petitioner's judgment and the laws of the State of Arizona.

V

That the Court erred in finding that the filing of the petition in intervention by said Asma Rubiaz did not create a lien, in favor of said intervenor, on said net income then in the hands of said Receiver.

VI

That the Court erred in not directing the Receiver to pay over to said intervening petitioner an amount necessary to satisfy her claim in accordance with the prayer of her petition in intervention.

VII

That the Court erred in ordering a diversion of the net income in the hands of the Receiver from the payment of said intervening petitioner's claim.

ARGUMENT

May it Please the Court:

All the specifications of error are so closely inter-related that any argument in support of one necessarily applies to all, making it impossible to discuss them individually. Our argument, therefore, may be considered as applying to each specification.

A. THE EQUITIES

We respectfully urge that if appellant was wholly

wrong in her legal points, and we believe she is not, the equities alone would demand prompt payment of her judgment.

The learned District Judge would seem, from his memorandum opinion (transcript, pages 174-175), to hold that Equity Rule 37 estopped appellant from raising any point of collusion or other equitable considerations. This we do not conceive to be the true construction of that rule. The original proceeding may have been most proper, but the actions of the parties to the proceeding, and their conduct subsequent to the appointment may show, or create, decided equities in favor of a claimant.

In the present case, for example, the original complaint set up appellant's judgment, the deed of trust and default thereunder, that the company was insolvent, the notes held by complainant and non-payment thereof, and prayed for a receiver to prevent attachments and dismemberment of the system. Had we asked that the receiver be dismissed they could probably have shown that the Transit Company did not have sufficient funds to pay our judgment, that execution to the amount of the judgment would result in the stoppage of transit for lack of the equipment seized, and resultant atrophy and dismemberment. And, if asked, we would have had to admit that we purposed to take out execution and satisfy our judgment. Obviously had the court denied our suppositious application, it could not be argued that he had

abused his discretion. Therefore the propriety of the main proceeding may be such as to leave no alternative to a claimant but to intervene, although he may feel certain that the entire proceeding lacks every element of good faith and is directed solely against him. And his intervention, we submit, does not destroy his equities, nor work a denial to him of equitable principles.

It is our contention that this entire proceeding has but one objective and that is to harrass, delay, and prevent, if possible, appellant's collection of her judgment, and that the Transit Company, Light Company and Trustee are united in this common purpose.

First, we desire to direct the Court's attention to the unity of counsel. When appellant brought action against the Transit Company in the State Court the company was represented by Kingan & Campbell (transcript, page 34). While this case was pending in the Supreme Court of Arizona, and while the same firm still represented the Transit Company on appeal, Kingan & Campbell, as attorneys for the Light Company, brought this action against the Transit Company (transcript, page 8), which created the anomalous situation of their defending a client in one court and prosecuting it in another. However, another attorney appeared as counsel for the Light Company in the receivership proceedings. This dual representation may be explained by a plea of acknowledged debt and present unity of interest in a receivership.

But the possibility that a conflict of interest might not later arise in the course of the receivership cannot be explained away, except on the theory that the interests of both were so indissolubly bound as to create the necessity for continuing unity. And unless Kingan & Campbell were absolutely sure of this continuing interdependence they would never, we feel sure, have brought action against their client.

But when the Trustee intervened we have another claimant looking for the satisfaction of his debt from the same assets that the Light Company was compelled to look to. Surely there were great potentialities for conflict here. Not only as to conflict between the two claimants, but between either or both claimants and the company whose property would be required to yield up the necessary wherewithal. Nevertheless we find this client also turning to Kingan & Campbell for representation and find this firm so assured of unity of interest in their three clients that they consent to, and do, appear for the Trustee also (transcript, page 102). This is not written in criticism of that firm—quite the opposite. We know them well enough to realize that they would never have accepted these different employments, so fraught, ordinarily, with such dangerous possibilities, unless they knew that all authority came from a single source and that the same power directed all three.

And this common unity of interest is shown in several other ways. Both the Light Company and the

Transit Company have the same general manager. We find Frank E. Russell, as general manager of the Transit Company, making affidavit of good faith to the deed of trust (transcript, page 95), and as general manager of the Light Company verifying its petition against the Transit Company (transcript, page 8). We find that the Light Company and Transit Company are "allied" companies, and so shown on the latter's books (transcript, page 164). We find in that part of the Receiver's report shown on page 164 of the transcript, that there are two companies "allied" with, or to, the Transit Company, viz, the Light Company and the Federal Light & Traction Company, AND THAT THE INTEREST ON THE BONDED INDEBTEDNESS IS CARRIED, NOT AS DUE TRUSTEE, BUT AS DUE THE FEDERAL LIGHT AND TRACTION COMPANY. Is it not a fair inference that the Federal Light & Traction Company is the real party in interest as to this deed of trust, not the Trustee, and that the real alignment is the three allies, Light Company, Transit Company and Federal Light & Traction Company, versus appellant? The name of the last mentioned company is significantly comprehensive.

The Trustee, Light Company and appellant are the sole creditors; there are no others. The receivership has now lasted for about three years and not a claim has been filed. The company's balance sheet (trans-

cript, page 164) also establishes this fact and shows no outstanding accounts.

Let us examine the situation prior to June, 1918, the time appellant secured her judgment in the state court. The interest coupons were then twelve years in arrears, yet not a single bond holder brought action, nor did the Trustee take any steps to disturb the mortgagor. The Light Company in 1915, 1916 and 1917 loaned the Transit Company sums aggregating \$60,000.00 without an atom of security and in the face of the mortgage and default thereunder. The lender did not even ask for a second mortgage, leaving it open for their debtor at any time, if it wished, to pledge everything it owned to still a third lender, subject only to the first mortgage. And while the notes called for eight per cent interest, the lender must have made the loans without any expectation of receiving interest. When the first loan was made the Transit Company was nine years' in default in its trust deed coupons. Nor did the Transit Company fail to run true to form. Neither principal nor interest was paid. Still, the Light Company did nothing (although its first note was over four years old) until appellant secured her judgment.

But this acquiescence by these two creditors did not arise from pure altruism. The last report of the receiver, April 4, 1921, shows that he then had on hand as net income, over cost of operation, the sum of \$11,756.19 (transcript, page 149). To this should

be added the sum of \$960.05 previously paid appellant under order of court, making a total of \$12,716.24 net earnings in a little over two years, or about \$6,000.00 net per year. If we added the receiver's salary and costs of receivership to this it would be considerably augmented. Besides, in addition to this income, the Transit Company buys its power from the Light Company (transcript, page 24), which means an income to the latter company of about \$500.00 per month (transcript, page 43). And this situation was quite satisfactory to both Trustee and Light Company prior to appellant's judgment.

But this judgment introduced a new element. Default in interest to the extent of over \$70,000.00 had not disturbed either bondholders or Trustee, nor had the debt of \$60,000.00 and accrued interest disturbed the Light Company. But appellant's judgment of less than \$5,000.00 disturbed both of them. Appellant was not one of the "allies," and the other two creditors were galvanized into action. An appeal was taken to the Supreme Court of Arizona and steps taken to anticipate an adverse ruling. In August, 1918, affidavit of good faith was made to the deed of trust to give it validity as a chattel mortgage, and the same month ninety per cent of the owners of the outstanding bonds, a suspicious unanimity, presented their coupons and demanded payment. February, 1919, the Light Company brought action on its notes and asked for a receiver. On the same day the Tran-

sit Company admitted the indebtedness and joined in the prayer for a receiver, and the receiver was appointed the following day. But it is most significant that NO JUDGMENT WAS EVER ENTERED AGAINST THE TRANSIT COMPANY IN FAVOR OF THE LIGHT COMPANY. The record, in accordance with the praecipe (transcript, pages 210-211), contains all the papers in the case (except the receiver's bond and the order fixing his compensation), and all the minute entries, and no such judgment is shown. Nor did the Light Company pray for the payment of its claim nor that the income be impounded for its benefit.

The Light and Transit Companies were the sole parties before the court for over fifteen months and, although demand was made by the bondholders twenty-one months prior thereto, the Trustee took no action — until after appellant intervened. Then it prayed that the lien of the deed of trust be declared prior to all other liens on all the property of the Transit Company, including the net income in the hands of the receiver, and that the court hold this fund and all subsequently acquired earnings to apply on the mortgage indebtedness (transcript, page 101). It did not ask, nor has it ever asked for a foreclosure of the mortgage, or a sale of the property. It would seem that the only creditor who desires any payment from the debtor is appellant.

And throughout the teamwork of the "allies" (we

but borrow their own characterization) has been excellent. The Transit Company (an adverse claimant) and the Light Company joined with the Trustee in requesting that its lien be declared prior to all others (transcript, pages 107-108, 125). Neither of the first two companies thought it worth while to file any answer to the Trustee's petition, and when the suggestion of paving between the rails was broached, we find all three again unanimous.

Conceding, but not admitting, that the original proceeding was proper, what can be the purpose of continuing this receivership?

Is it to collect the Light Company's account? That company never took judgment, never asked that the income be impounded for its benefit, expressly averred that the Trustee had a lien on the property and income prior to its own, never asked for a sale of the property to satisfy its claim, and now prays that a fund that might be used in reducing claims prior to its own be used for paving. There is nothing to indicate that this is the object.

Is it to collect the money due the bondholders? It is now over fifteen years since default was made, and the right of foreclosure has rested with the Trustee and bondholders continuously during that period. It is now over fifteen years since the bondholders have received one cent on their bonds. The receivership has continued for three years. Yet up to the present

no foreclosure has been asked, and foreclosure is the only procedure permitted under the statutes of Arizona:

4113. All mortgages of real property and all deeds of trust in the nature of mortgages shall, notwithstanding any provision contained in the mortgage, be foreclosed by action in a Court of competent jurisdiction. Revised Statutes of Arizona, 1913.

It cannot be that they hope to pay off the indebtedness from the income. This indebtedness is about \$90,000.00 now and increasing at the rate of \$6,800.00 per year. The income is totally inadequate for this purpose.

Is it to prevent dismemberment by creditors? There are no creditors but the Trustee, Light Company and appellant. And there are more than sufficient funds now on hand to pay appellant. She could have been paid, and that danger obviated, long ago if they were acting in good faith.

Is it to prevent waste and mismanagement? There is no allegation or suggestion of wasteful or improvident management.

As far as objective is concerned this receivership could go on *ad infinitum* and accomplish no good; unless the non-payment of appellant's judgment be considered a "good."

We respectfully submit that the plan and purpose of this receivership is exactly what we stated at the beginning of this argument and should not be tolerated. The courts have frequently, and forcibly, expressed themselves as to situations similar to this one:

The process of the court has not been used in good faith to collect complainant's judgment, but as a means of placing the property and business of the defendant railroad company in the hands of the court to be managed through a receiver, to the end that the defendant may not be subjected to suits in the ordinary course of judicial proceedings, and in order to enable the plaintiff and defendant, by agreement between them, through the receiver to apply all the earnings of the road during a series of years to the improvement and betterment of the property.

* * * In short, the complainant and defendant have sought to make use of this court as an instrument to carry on, through the hands of a receiver, the important business of the defendant corporation; and this, not for the purpose, in good faith, of enforcing the confessed judgment set out in the bill but for the purpose of protecting the property of defendant from seizure on legal process, while the earnings are applied to the improvement of the road. In other words, the court is asked to stand between the company and its creditors, while the company is engaged in using the earnings, not to pay its debts, but to improve its property.

It is said that this policy is best for the company and its creditors. Whether this be so is for the company and its creditors to determine; it is not for the court to engage in the operation of a railroad through a receiver, because the interests of the parties concerned may be thereby advanced. It does not appear that any suit has been commenced to foreclose either of the mortgages on the road. *Sage vs. Memphis & L. R. R. Co.*, 18 Fed. 571.

Petitioner desires that steps should be taken to pay its claim. It contends that this court should not appoint a receiver simply "to hinder and delay creditors." That seems to have been the only object that has thus far been accomplished by the appointment of the receiver. * * * Neither the appointment of a receiver, nor the issuance of an injunction should be sustained where it is apparent or left in doubt, as to whether or not they were obtained for any other purpose than delay. *Cohen vs. Gold Creek Nevada Mining Co.*, 95 Fed. 580.

When a receiver has been appointed to hold property in which third persons have an interest, it is incumbent on the persons who have secured the appointment to prosecute the litigation effectively, and without unnecessary delay, and it is equally incumbent on a court which has acquired possession of property through the agency of a receiver to discharge it from judicial custody at the earliest practical moment, to the end that it may not be held in

such custody at the instance of one suitor or suitors to shelter it from the just claims of others. *Minot vs. Mastin*, 95 Fed. 734.

See also *Louisville Trust Co., vs. Louisville N. A. & C. R. Co.*, 174 U. S. 674, 43 L. Ed. 1130.

B. THE NET INCOME

Respective rights of the creditors to the funds in the hands of the receiver.

The fund we are discussing is the \$8,768.77 in the hands of the receiver on April 1, 1920 — the date appellant filed her petition in intervention — and which represents the net income of the Transit Company after paying the costs and expenses of conducting its business (transcript, pages 42, 144).

(1) The Light Company: In discussing the equities we have practically disposed of this company's right to the fund. To briefly summarize, it is not a judgment creditor, it has never asserted any rights in, or priorities to, this fund nor do its pleadings entitle it to any. And these facts distinguish its position from Sage's in *Sage vs. Memphis & Little Rock R. R. Co.*, 125 U. S. 361, 31 L. Ed. 694. It has even specifically disclaimed any priority, or lien, and prayed that the Court so decree (transcript, pages 107-108).

(2) Trustee: It has been repeatedly held that the mortgagee is not entitled to the rents and profits of the

mortgaged property until he takes actual possession, or until possession is taken in his behalf by a receiver, or until in proper form, he demands and is refused possession. And that any action the mortgagee may take can have no retroactive effect on rents and profits earned prior to such action:

American Bridge Co. vs. Heidelberg, et al., 94 U. S. 798, 24 L. Ed. 144; *U. S. Trust Co. vs. Wabash Western Co.*, 150 U. S. 287, 37 L. Ed. 1085; *Dow vs Memphis & Little Rock R. R. Co.*, 124 U. S. 652, 31 L. Ed. 565; *Sage vs. Memphis & Little Rock R. R. Co.*, 125 U. S. 361, 31 L. Ed. 694. *Friedman S. & T. Co. vs. Shepherd*, 127 U. S. 494, 32 L. Ed. 163; *Gilman et al. vs. Telegraph Co.*, 91 U. S. 603, 23 L. Ed. 405; *Hook vs. Bosworth*, 64 Fed. 443; *Vcatch et al. vs. American Loan & Trust Co., et al.*, 79 Fed. 471; *Teal vs. Walker*, 111 U. S. 242, 28 L. Ed. 415.

(3) Appellant: While the law required the trustees to impound income and gives him no lien on income earned prior to such impounding, this is not true of a statutory lien. It attaches to all property as received and is subject only to prior liens, and in this instance there were no prior liens.

It was argued by appellees in the court below that appellant had no lien on this specific fund until some action was taken by her to "fix" her lien, such as a levy of execution, and the learned judge of the district court

was evidently of this opinion because in his memo opinion he says (transcript, page 175):

I think it clear that neither of the intervenors had any lien on the money in the hands of the Receiver merely because they had a lien on the real and personal property of the Transit Company, and neither had any right to the money until a petition was filed herein praying that same be impounded for the payment of such liens.

But, in *Thomas vs. Cincinnati, N. O. & T. P. Ry. Co.*, 91 Fed. 202, Taft, Circuit Judge, disposes of this contention:

It is argued that neither the eleventh section of the Kentucky Enabling Act of February 13, 1872, nor the general Tennessee Railroad Act of March 24, 1877 (upon which the judgment creditors of Kentucky and Tennessee found their claim of priority, and which I have set forth and discussed in an opinion filed today 91 Fed. 105) upon the master's report, secures to the judgment creditors of the class therein favored any specific lien; that these acts only invalidate or postpone mortgage priorities asserted; and that, when no mortgage priority is asserted, then there is nothing upon which such judgments may be preferred to other claims, whether in judgment or not. IT IS FURTHER CONTENDED THAT THE BENEFIT SECURED TO JUDGMENTS OF THE FAV-

ORED CLASS BY THESE ACTS IS ONLY TO BE ENJOYED AFTER SUCH JUDGMENTS HAVE BEEN MADE EFFECTIVE LIENS BY THE LEVY OF EXECUTION AND THAT NOT UNTIL THEN CAN MORTGAGES AND OTHER CREDITORS BE POSTPONED TO SUCH JUDGMENTS.

At the hearing I was much impressed with the weight of these suggestions, and was inclined to order an equal distribution. I was the more persuaded of the correctness of these arguments because the court of appeals of this circuit had expressly decided that the Tennessee act of March 24, 1877 (and the Kentucky act is quite similar in this respect), does not give to judgments of the favored class such a lien, attaching to the property of the railroad company, as to follow it into the hands of a grantee for value without notice. *Railroad Company vs. Evans*, 31 U. S. App. 432, 14 C. C. A. 116, and 66 Fed. 809; *Guarantee Co. vs. Hoffstetter*, 29 C. C. A. 35, 85 Fed. 75. On careful reflection I am convinced that my first impression was wrong, and that the judgments favored by the Kentucky and Tennessee laws must be first paid in full out of this net earning fund. There is nothing in the decision of the court of appeals referred to from which it is to be inferred that the priority over mortgage liens accorded to such judgments may not operate in the distribution of the assets of a rail-

way corporation upon a general creditors bill, in which such judgments and mortgage debts are both set up with precisely the same effect as if the statute had given a specific lien. But for this general creditors' bill, these judgments in Tennessee might have been enforced by execution and sale of the rolling stock in that state, and if the rolling stock did not suffice, then by execution and sale of so much of the leasehold interest as has a situs there; and such sales would have been free from any mortgage or other lien of the trustee for rent. * * *

Now, a creditors' bill is merely an equitable levy and execution, for the benefit of all creditors, secured and unsecured, and the question of priority is to be settled in the same manner as if execution at law had been levied, at precisely the same time, as upon judgments duly rendered, for all claims found by the court to be just. By such an equitable levy and execution as the filing of this bill and the seizure of the property, therefore, the judgments in Tennessee and Kentucky of the favored class are given a priority, very like that of a senior lien, over the trustee's lien, upon the property of the defendant company in those states, and the trustees have a lien prior to the lien of all the other creditors. The surplus of earnings from the operation of the railroad property, over and above the cost of operating, belongs to the creditors for whose benefit the creditors' bill has been filed, in the same

order of priority as must be preserved upon principles of equity in the distribution of the proceeds of the property operated upon sale. This must be so. Otherwise the operation of the property could not be for the equal benefit of all creditors.

Of necessity this must be so. The Arizona statute says: "A judgment * * * * shall be a lien * * * * on the property" of the judgment debtor. ,

The position taken by the appellee companies in the lower court that this lien has to be "fixed" by levy, attachment or garnishment, would work an absurdity, and would distort the statutes to read: "A judgment * * * shall be a lien * * * * on the property" of the judgment debtor "when it becomes a lien by being made a lien by some legal process that in and of itself creates a lien." And it might consistently conclude "and this statute means nothing."

The policy of the law that says to a mortgagee "Although you may have a pledge of the rents and incomes, nevertheless as you have voluntarily permitted the pledger to use them and secure credit thereby, you may not now be heard to object to their use to pay obligations, and your lien does not attach to prior earnings," does not apply to any other obligation or debt and especially a judgment lien. There is no such tacit understanding between the debtor and judgment creditor.

And that statutory liens will be recognized in receivership proceedings has been universally held.

In *Wiswall vs. Sampson*, 14 Howard 52, 14 L. Ed. 322, the court quoted with approval from *Codewise V. Gelston*, 10 J. R. 521:

Chancellor Kent, in delivering the opinion of the court in *Codewise V. Gelston*, as Chief Justice, observed, "That if a fund for the payment of debts be created under an order or decree in chancery, and the creditors come in to avail themselves of it, the rule of equity then is, that they shall be paid *in pari passu*, or upon a footing of equality. But when the law gives priority, equity will not destroy it, and especially when legal assets are created by statute, as in case of a judgment lien, they remain so, though the creditors be obliged to go into equity for assistance. The legal priority will be protected and preserved in chancery."

Booth vs. Clark, 17 Howard 322, 15 L. Ed. 164:

A receiver is an indifferent person between parties appointed by the court to receive the rents, issues, or profits of land, or other thing in question in this court, pending the suit, where it does not seem reasonable to the court that either party should do it. *Wyatt's Prac. Reg.* 355. He is an officer of the court; his appointment is provisional. He is appointed in behalf of all the parties, and not of the complainant or defendant only. He is appointed for the benefit of all parties who may establish rights in the cause. The money in his hands

is in *custodia legis* for whomever can make out a title to it.

Fosdick vs. Schall, 9 Otto 235, 25 L. Ed. 339:

The possession taken by the receiver is only that of the court, whose officer he is, and adds nothing to the previously existing title of the mortgagees. He holds, pending the litigation, for the benefit of whomsoever in the end it shall be found to concern, and in the meantime the court proceeds to determine the rights of the parties upon the principle it would if no change of possession had taken place.

To the same effect as above is *Quincy M. & P. R. Co., vs. Humphreys*, 145 U. S. 82, 36 L. Ed. 632. 1, c, 637.

See also *Commonwealth Roofing Company vs. North American Trust Company*, 135 Fed. 984.

The Trustees having no lien on this fund, it is immaterial whether the fund be considered as realty or personalty. In either case appellant's lien was prior.

Nor should appellant's claim be defeated even though she had no statutory lien. At the time she filed her petition in intervention she was a judgment creditor and the only judgment creditor. The Company, by its receiver, held over \$8,000.00 net income. This money had not been impounded by the Light Company for its benefit, nor requested by it. Appellant's petition was an equitable levy under and by virtue of her judgment.

Sage vs. Memphis & L. R. R. Co., *supra* (Supreme Court citation) ;

Hook vs. Bosworth, 64 Fed. 443.

Veatch, et al. vs. Am. Loan & Tr. Co., et al., 79 Fed. 471.

The Light Company, as we have shown, having eliminated itself, the only contenders remaining are Trustee and appellant. As to the rights of these two creditors a pertinent case is *American Bridge Company vs. Heidelberg*, 94 U. S. 798, 24 L. Ed. 144. It is short and may be quoted in its entirety:

"The controversy in this case has arisen out of a mortgage executed by the Kansas and Missouri Bridge Company to the appellees as trustees, to secure the payment of principal and interest of certain bonds issued by the mortgagor and described in the mortgage.

Besides the bridge of the Company the mortgage included "the rents, issues and profits of said bridge, as far as the same are not required to pay the necessary expenses of keeping in repair and operating said bridge, which rents, issues and profits," it was declared, "are hereby pledged to the payment of said interest as it matures, and to the establishment of a sinking fund for the redemption and payment of the principal of said bonds," etc. It was further provided, that if the interest were in default for six

months, the trustees, upon the written request of the holders of one half of the outstanding bonds, might take possession of the mortgaged premises, manage and operate the bridge, and receive and collect all rents and claims due and to become due to the company.

The interest upon the bonds being in default, the trustees, on the 25th day of November, 1874, filed their bill, wherein, among other things, they set forth that there was in the hands of the Company a certain amount of money which ought to be applied upon the mortgage and certain claims due to the Company, the proceeds of which ought to be applied in like manner. The bill prayed accordingly.

The appellant, the American Bridge Company, held a judgment for \$15,435.88 and costs against the Kansas and Missouri Bridge Company, upon which execution had been returned, *nulla bona*. On the 11th of December, 1874, the judgment creditor filed a bill claiming priority of payment out of the money and the proceeds of the claim above mentioned. It appears that there is a sufficient fund to meet the demand awaiting below the termination of this litigation.

It cannot be denied that the return of the execution, the filing of the bill, and the service of process, gave the judgment creditor a lien upon the fund in question which must prevail, unless the

mortgagees have shown a paramount right to it. *Miller vs. Sherry*, 2 Wall, 249 (69 U. S. XVII, 830); 2 Barb. Ch. Pr., 2d rev. ed., 157, n. 13. The question as to the right claimed by the trustees is conclusively settled against them by *R. R. Co. vs Cowdrey*, 11 Wall. 459 (78 U. S. XX., 199); and *Gillman vs. Telegraph Co.*, 91 U. S. 603 (XXIII), 405.

Both these cases, as regards this point, present exactly the same legal aspect as the case before us. It is unnecessary to reproduce at length what was said in those adjudications.

In this case, upon the default which occurred, the mortgagees had the option to take personal possession of the mortgaged premises, or to file a bill, have a receiver appointed, and possession delivered to him. In either case, the income thereafter would have been theirs. Until one or the other was done, the mortgagor, as Lord Mansfield said in *Chinnery vs. Blackman*, 3 Doug. 991, was "owner to all the world, and entitled to all the profit made."

The mortgage could have no retrospective effect as to previous income and earnings. The bill of the trustees does not effect the rights of the parties. It was an attempt to extend the mortgage to what it cannot be made to reach. Such a proceeding does not create any new right. It can only enforce those which exist already. The bill of the trustees is as

ineffectual as if the fund were any other property, real, personal or mixed, acquired by the mortgagee aliunde, and never within the scope of the mortgage."

It is true that no execution was issued in the present case and no *nulla bona* return had. But as the order appointing the receiver gave him possession of "all of the property and assets of every kind and description" of the Transit Company, execution would be obviously futile, and would have been, as the court said in *Sage vs. Memphis & Little Rock Ry. Co.*, *supra* (Supreme Court decision), "an idle ceremony."

In the present case, it is true, Sage did not sue out execution on his judgment and have a return of *nulla bona*. But that point has become immaterial. The railroad company made no such objection at the time the Receiver was appointed. BESIDES, SUING OUT AN EXECUTION WOULD, ACCORDING TO THE FACTS AND ADMISIONS OF THE PARTIES, HAVE BEEN AN IDLE CEREMONY. *Sage vs. Memphis & Little Rock Ry. Co.*, *supra*.

Moreover, in the present case the Light Company, without objection, secured the appointment of a receiver without either judgment or issue of execution.

The learned District Judge treated appellant's petition as one to impound future income. But appellant's

petition specifically set up that this income was in the hands of the receiver, that she had the prior right thereto, and prayed for "immediate payment" of the amount due her.

2. *Diversion of the fund to paving.*

But the Light Company, Trustee and Transit Company contend that this fund should be used for paving, to protect the company's franchise from forfeiture.

It goes without saying that the city cannot, even if it would, declare any forfeiture of the company's franchise while it is in the hands of the receiver. Any such action on the City's part would not only be ineffectual, but an attempt to enforce it would be a gross contempt of court. *Royal Trust Co. vs. Washburn B. & I. Ry. Co.*, 113 Fed. 531. It follows that THE FRANCHISE THESE THREE ARE ATTEMPTING TO PRESERVE IS THE FRANCHISE THE COMPANY WILL HAVE AFTER THE RECEIVERSHIP PROCEEDINGS ARE TERMINATED, and they are attempting to do it with money due appellant. Whether Stone Avenue is paved or not paved cannot effect the court's operation of the road thru the receiver.

If the city desires the company to pave between its tracks, the proper step would be for the city to intervene and ask that this be done. Then whether or not the Transit company was legally required to take such

a step could be looked into and determined. This the city has not seen fit to do, and it does not lie with the Trustee, Light Company and Transit Company to seek the enforcement of an undetermined, unadjudicated claim of a third party who apparently has so little interest in its claim, or so faint a belief in the strength of its contention that it does not care to advance it in its own right.

Nor can we agree that the Transit Company, or the other two creditors, have any right to use money held for the payment of creditors to preserve its franchise or, as the Transit company naively puts it, "enhance the value of the Trustee's security", even had the city power to forfeit the receiver's franchise. *Spackman vs. Swan Creek Orchard Co.*, 274 Fed. 107. THIS MONEY IS THE CREDITORS' MONEY AND IS NOT SUBJECT TO THE IMPROVEMENT OF THE PROPERTY, THE ENHANCEMENT OF THE TRUSTEE'S SECURITY, NOR MAY IT BE USED TO PREVENT A FORFEITURE OF THE FRANCHISE. Quoting again from the opinion rendered by Taft, Circuit Judge, in *Thomas vs. Cincinnati N. O. & T. P. Ry. Co.*, *supra*, we find:

But it is urged that the rental had to be paid to prevent a forfeiture of the lease to the trustees and the city; that, but for this, no net earning would have been earned, and therefore the rental paid inured to the benefit of the judgment credi-

tors of Kentucky and Tennessee. Those creditors could have enforced their claims against the rolling stock whenever the trustees attempted to forfeit the leasehold and sell the rolling stock. They would not have been harmed by such a proceeding, because, by a separate sale of the rolling stock, they could have been certainly paid in full. They have not moved the court to sell the rolling stock separate from the leasehold, as they might have done long ago; and now, when, by reason of their forbearance, the trustees have received their rent in full, and enough money has been earned to pay them in full, they, WHO MIGHT HAVE INSISTED ON PAYMENT OUT OF THE FIRST NET EARNINGS, going to make up the great fund of \$6,000,000.00 since earned MUST BE PAID.

If, in the above case, the judgment debtors were entitled to payment out of the first net earnings despite the danger of the forfeiture of the lease, why is not appellant entitled to payment out of the first net earnings?

Moreover, the reports of the receiver show a steady increase in the net income. The last report, filed April 4, 1921, shows that there was in the receiver's hands on that date, the sum of \$11,756.19 (transcript, page 149). The estimated cost of paving is \$8,000.00 (transcript, page 106). At this rate of increase appellant's claim

could be paid, the greater part of the cost of paving, if not all, paid in cash, and receiver's certificate issued for the balance.

In conclusion we earnestly and respectfully urge that by reason of the law and the equities, the order of the lower court should be reversed and that the District Court should be ordered to enter a decree directing the payment to appellant Asma Rubiaz as prayed for in her intervening petition filed in this action.

Respectfully submitted,

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.....
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Attorneys for Appellant Asma Rubiaz.

**United States
Circuit Court of Appeals
For the Ninth Circuit**

ASMA RUBAIZ,

Appellant;

vs.

THE TUCSON GAS, ELECTRIC LIGHT &
POWER COMPANY, a Corporation, TUCSON
RAPID TRANSIT COMPANY, a Corporation,
THE INTERNATIONAL TRUST COM-
PANY, a Corporation, and EDWIN F. JONES,
as Receiver,

Appellees.

**BRIEF OF APPELLEES, INTERNATIONAL
TRUST COMPANY AND TUCSON GAS,
ELECTRIC LIGHT & POWER COMPANY**

Upon Appeal from the United States District Court
for the District of Arizona

S. L. KINGAN,
JOHN H. CAMPBELL,
A. R. CONNER,
Tucson, Arizona,
Attorneys for Appellees.

Filed this day of January, 1922.

.....
Clerk of the United States Circuit Court of Ap-
peals, Ninth Circuit.

FILED

FEB 2 - 1922

F. D. MONCKTON,

Service of two copies of within Brief of Appellees
is hereby acknowledged this.....day of January, 1922.

.....
.....
Attorneys for Appellant, Asma Rubiaz.

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**BRIEF OF APPELLEES, INTERNATIONAL
TRUST COMPANY AND TUCSON GAS,
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STATEMENT OF CASE

Although appellant has made a statement of facts, we consider it essential to make a further statement in order that the court may be advised more fully of the precise matters in controversy.

At the time the receiver was appointed for the Transit Company, in 1919, the following conditions existed:

The Transit Company was the owner of about four miles of street railway, a few cars, and a city lot on which the car barn was situated. It owned no other property. In 1906 it had executed a deed of trust to the International Trust Company upon all of the property it then had or might thereafter acquire, including revenues, profits and incomes, to secure a bond issue. Of this issue, \$114,000 had been sold and were held by various persons. No interest had been paid since 1907, and it had accumulated to the extent of approximately \$70,000.00. In 1915, or thereabouts, the Light Company had loaned the Transit Company \$60,000.00, none of which had been paid. In 1918, the appellant Rubaiz had obtained a judgment in the trial court for \$4500.00, and the case was on appeal to the Supreme Court of the State. The franchise of the Transit Company requires it to pave between the rails and one foot on the outside of same whenever the city paves a street, and upon its failure to do so the city reserves the right to forfeit the franchise. At the time the receiver was appointed, a street occupied by the Transit Company was about to be paved. The company had no funds except about \$100.00, which it turned over to the Receiver. (Tr. p. 42).

The receiver took charge of the property and by reason of the fact that he used the equipment without replacements or work upon the roadbed, and an increase of fare, accumulated by May, 1920, a fund of approximately \$8,000.00. (Tr. p. 42). In the meanwhile, the judgment of the trial court in the Rubaiz case had been af-

firmed by the Supreme Court of the State, and the appellant had intervened in the receivership proceedings, claiming a first lien on the personal property of the Transit Company, and the right to have her judgment satisfied out of the fund in the receiver's possession. Also the International Trust Company had intervened, setting up the deed of trust, and asking that all moneys derived from the operation of the property be paid to it to apply upon the indebtedness, and the receiver hold the property for it.

At this time, May, 1920, appellant, as intervenor, made three several motions, (1) to dismiss the complaint in intervention of the International Trust Company; (2) to strike the answer of the Light Company to the complaint in intervention of the appellant, and (3) to strike the answer of the Transit Company to the complaint in intervention of the appellant. The motions (Tr. ps. 133-141, inc.), in greater detail are: The motion to dismiss the complaint in intervention of the International Trust Company is on the grounds that the complaint does not state facts sufficient to entitle the Trust Company to a lien prior or superior to the lien of the intervenor Rubaiz on the money or personal property of the Transit Company; because the complaint does not state facts sufficient to entitle the Trust Company to any equitable relief involving the money or personal property of the Transit Company in the hands of the receiver as against the lien of the intervenor Rubaiz, and because the complaint of the Trust Company is seeking only to

have the property or assets of the Transit Company used for the protection and preservation of the property. The motion to strike the answer of the Transit Company is on the grounds that the answer does not state facts sufficient to entitle the Trust Company to a superior lien on the money or property of the Transit Company in the hands of the Receiver; because the answer does not state facts entitling the Trust Company to equitable relief as against the money or personal property of the Transit Company in the hands of the Receiver, and because the answer shows upon its face that the Transit Company is colluding with the Trust Company and the Light Company to have the assets of the Transit Company used for the protection and preservation of the property, and to defeat the claim of the intervenor Rubaiz. The motion to strike out the answer of the Light Company is on the grounds that the answer does not state facts sufficient to entitle the Trust Company to have a prior lien over the judgment lien of the intervenor Rubaiz; because the answer does not state facts sufficient to entitle the Trust Company to any equitable relief against the money or personal property of the Transit Company in the hands of the Receiver, and because the answer of the Light Company shows that it is colluding with the Trust Company and the Transit Company, to have the assets of the Transit Company used for the protection and preservation and enhancement of of the security of the Trust Company, and to defeat the claim and lien of the intervenor Rubaiz.

These were the motions before the court, the ruling upon which is the matter of appeal before this court. On their hearing no evidence was introduced, and the matter was submitted upon argument and reference to the pleadings, reports and various documents before the court, and all of which are contained in the transcript. It will be noted that no motions were made or other proceedings taken to terminate the receivership proceeding, or complaint made as to the receivership. Practically the entire matter went to one point, namely that intervenor Rubaiz was entitled to have paid to her the amount of her judgment out of the fund then in the hands of the Receiver, upon the theory that she had a superior lien upon the personal property of the Transit Company and the money in the hands of the Receiver.

The court held (Tr. ps. 173-178, inc.), briefly as follows: That all of the property of the Transit Company was real estate, and hence covered by the deed of trust; that the mortgage was in no wise a chattel mortgage, but a real estate mortgage, covering real estate, and hence, and in effect, that Sec. 3624, Revised Statutes of Arizona, 1913, giving priority to judgments for personal injuries over mortgages, had no application, as by the terms of the statute it did not apply to mortgages given before the passage of the statute; that under Equity Rule 37, intervenor Rubaiz, by her intervention, recognized the propriety of the original proceedings and was bound thereby, that is to say, the receivership was a proper proceeding; that as to the income in the hands

of the receiver, collected by him prior to the intervention of either party, that neither party had a lien thereon; that for the period between the dates that intervenor Rubaiz intervened and the Trust Company intervened, that intervenor Rubaiz was entitled to the income, and that thereafter the Trust Company was entitled to the income; that as the Mayor and Common Council of the City had ordered a street paved, and in order to preserve the franchise of the Transit Company, the receiver use the fund then in his hands for the purpose of paving.

From the judgment so rendered appellant has appealed to this court, and filed herein her assignments of error, seven in number. (Appellant's Brief, ps. 13 and 14). The assignments are of so general a character that it is next to impossible to ascertain from them the errors appellant complains of. The rule is that the assignments of error must be so complete and clear that the court may obtain therefrom a specific statement of the questions presented without reference to the brief or any other source outside of the assignments themselves. *Van Gunder v. Va. Coal & Iron Co.*, 52 Fed. 838, 3 C. C. A. 294; *Grape Creek Coal Co. v. Farmers Loan & Trust Co.*, 63 Fed. 891, 12 C. C. A. 350; *Fitch v. Richardson*, 147 Fed. 196, C. C. A. 1st Cir.; *Moline Trust & Savings Bank v. Wylie*, 149 Fed. 734, C. C. A. 8 Cir. Also rules 11 and 24 of this Court.

The first assignment of error, namely, that the court erred in finding the law against the intervenor, assigns

no error. The second assignment, namely, that the facts shown by the pleadings and documents entitled the intervenor to a decree in her favor, assigns no error. The third assignment, namely, that the finding and decree of the court are against the law and equity, assigns no error. The fourth assignment, namely, that the court erred in holding that the intervenor did not have a lien on the net income in the hands of the Receiver, given its most liberal interpretation, must be confined to the one point mentioned. The fifth assignment, namely, that the court erred in finding that the filing of the petition by intervenor Rubaiz did not create a lien in her favor on income theretofore accumulated, likewise can have no further application than assignment No. Four. The sixth assignment, that the court erred in not directing the Receiver to pay over to the intervenor Rubaiz an amount necessary to satisfy her claim, likewise can have no further application or be construed to include any additional error. The seventh assignment, namely, that the court erred in not ordering a diversion of the net income in the hands of the Receiver to the payment of the intervenor's claim, adds nothing. It follows that the only assignment of error, giving the assignments the most liberal interpretation, goes only to the one point, namely, that the court erred in not ordering the Receiver to pay the intervenor the amount of her judgment from the funds then in the hands of the Receiver. Why this was an error, must be left to conjecture. No error is assigned or complained of as to

the propriety of the receivership proceedings or their termination, or of any alleged collusion, or of any act of the court in connection therewith.

All of the property of the Transit Company is real estate, is covered by the deed of trust of 1906, and Section 3634 of the Revised Statutes of Arizona of 1913 has no application.

It has been uniformly held by the Federal Courts that property essential to the operation of a railroad, including the rolling stock and other necessary movable appliances, are real estate. The principle is laid down in *Jones on Mortgages*, 7th Ed., Sec. 452, and the cases cited, as referred to by the trial court.

The deed of trust therefore of 1906 was a realty mortgage upon real estate, and the question of a chattel mortgage or of personal property is not involved.

Sec. 3634 of the Revised Statutes of Arizona, 1913, by its terms, applies only to mortgages or trust deeds executed after the passage of that act. Consequently, this section can have no application to the deed of trust in question here. The statute is:

“A judgment against any railway corporation or street railway corporation or co-partnership for an injury to any person or property shall be a lien within the county where recovered on the property of such corporation, and such lien shall be prior and

superior to the lien of any mortgage or trust deed executed after this section takes effect.”

All of the property of the Transit Company, being real estate, and covered by a real estate mortgage executed in 1906, the provisions of this section have no application, and the lien of the trust deed is superior to the statutory lien.

Equity Rule No. 37

Under this rule, providing that anyone claiming an interest in litigation may at any time assert his right by intervention, but that the intervention shall be in subordination to and in recognition of the propriety of the main proceeding, it must be that appellant cannot question the rightfulness and propriety of the action, nor maintain that there was any wrongful collusion either in the bringing or maintaining of the action.

ANSWERING THE ARGUMENT OF APPELLANT

Counsel for appellant divide their argument into two heads, one designated “Equities,” and the other “The Net Income.” We will take these up in the order counsel have treated them.

Counsel, at the outset, announce that it is their contention that the entire proceeding has but one objective, namely, to harrass, delay and prevent the appellant from the collection of her judgment. There are two

reasons why the contention of appellant should not be considered here: First, that they have assigned no error on this head, and second, that under Rule 37, they did, by intervening, admit the propriety of the proceedings.

But, notwithstanding that appellant is not entitled to be heard on this matter, we will briefly answer the argument advanced. There is no evidence, except inferences taken here and there from the various pleadings, reports of the Receiver and so on. Because of what is termed "Unity of Attorneys," it is inferred by appellant that collusion of necessity follows. It appears that Mr. Kingan, one of counsel here, acted at one time as attorney for the Transit Company; also that the firm of Kingan, Campbell & Conner are attorneys for the Light Company and also for the International Trust Company. There is no question in regard to this. It is perfectly true. But we fail to see that because Kingan, Campbell & Conner occupy the position of attorneys as set forth, that it follows that there is any collusion in this cause. As a matter of fact, Mr. Kingan has been attorney for the Light Company for approximately seventeen years last past, and at times during that period has acted for the Transit Company, and Kingan, Campbell & Conner are now the attorneys for the Light Company. The International Trust Company, knowing this fact, and there being no conflict between the Trust Company and the Light Company, Kingan, Campbell & Conner have acted for the Trust Company.

The claim of the Trust Company is that the mortgage executed to it in 1906 to secure bondholders is prior and superior to the claim of all other persons. This is admitted by the Light Company. The other inferences of appellant as to collusion are quite as far fetched as the foregoing. The International Trust Company, one of the largest institutions of its kind in the west, has no interest except to protect the interests of the bondholders. The Light Company, which is no more controlled by the Trust Company than the Trust Company is by it, only desires to protect its claims. As for the Transit Company, it is in the hands of the court, and cannot collude with anyone. If there was any collusion in this matter, and appellant desired to stand upon this point, evidence might have been taken and submitted to the trial court and the matter made an issue. This was not done.

As to the other matters discussed by counsel for appellant under the general head of their equities, and particularly their argument contained on pages 22 to 26, of their brief, namely, that the receivership should be terminated, we have only to say that this is an appellate court, and there having been no pleading or action of any kind taken below to terminate the receivership for any cause, and the matter never having been in any way presented to the trial court, that the matters complained of cannot be reviewed here.

The "equities" claimed by appellant appear to incline all in one direction, namely, the payment of her judg-

ment, even if by so doing the property of the Transit Company be wrecked. Notwithstanding that it is essential, in order to preserve the property in the hands of the Receiver, that the franchise be protected by doing the necessary paving, appellant insists under her claim of "equities," that although destruction come about, and the bondholders lose their all, nevertheless she should be paid, and this in the face of the fact that her lien is second to that of the Trustee.

Next considering the second point of appellant, namely, "The Net Income."

The suit brought by the Light Company was a general creditor's suit. It was prayed that the Court take into its possession the property of the Transit Company, that all claims be ascertained and determined, that the assets be marshalled, priorities ascertained, and a Receiver be appointed with power to operate the railway, receive the income and dispose of the same as the Court should direct. (Tr. p. 9).

At the time the Receiver was appointed, the status of the Trust Company and of the appellant were: (a) The Trust Company had a first lien on all of the property of the Transit Company, including income; (b) Appellant, by reason of the judgment of the trial court, had a second lien on the property of the Transit Company.

We make this statement for the reason that the mortgage of 1906 covered all the property of the Transit Company: that all of the property was real estate,

including the cars (which are the only movable property of the company); that the statute of 1913, by its terms, only applies to mortgages made after its passage, and that, in the absence of statute giving them preference, judgments for damages are not preferred.

In *St. Louis Trust Co. v. Riley*, 16 C. C. A. 610, 70 Fed. 32, a claim for damages was denied preference on the ground that it was unnecessary expense. So, too, in *Farmers Loan & Trust Co. v. Detroit Co.*, 71 Fed. 29, a judgment in a negligence case was held not entitled to priority out of funds in the hands of a receiver before the mortgage was paid. In *Farmers Loan & Trust Co. v. Green Bay R. Co.*, 45 Fed. 664, a claim for causing death was held not entitled to priority against a fund in the hands of a receiver as against a mortgage. Also in *Ames v. Union P. R. Co.*, 74 Fed. 335, a judgment for negligence in the operation of the railroad was held not a superior lien to that of a mortgage. Also in *Foreman v. Central Trust Co.*, 18 C. C. A. 321, 71 Fed. 776, a judgment against a railroad company was held not to be a lien superior to a prior mortgage, although the judgment in the state court provided that the judgment should be a lien.

"It is well settled by the decisions of this and other courts that such claims (personal injuries) are not preferential debts." Judge Van Deventer, in *Atlantic Trust Co. v. Dana*, 128 Fed. 216.

The claim of appellant, therefore, is neither preferred by law nor by statute.

Such were the conditions when the Receiver took over the property. The fund now in question was not then in existence, and hence neither party had a lien on it, although the Trustee had a vested right by reason of the deed of trust to claim the income. As stated by Judge Van Deventer in the case already cited:

“But a mortgage of income, even before it is made effective against future income in the sense just mentioned, gives to the mortgagee a vested right which cannot be displaced, postponed or impaired, in the interest or at the instance of an unsecured creditor, any more than can the mortgage lien upon the corpus of the property.” Citing pages 226-227, 128 Fed.

Appellant, by her lien, obtained in 1918, could not obtain a higher right than the mortgagor then possessed. At the time appellant's lien accrued, the mortgagor had already pledged its property; of necessity appellant's lien could only fasten upon the mortgagor's rights as they then existed.

American National Bank v. Northwestern Mutual Life Insurance Co., C. C. A., 8th Cir., 89 Fed. 610, citing page bottom 614.

The fund in question accumulated in the hands of the court. Neither the Trust Company nor the appellant

obtained a lien on this fund. The Trustee might have impounded it as income. (*Atlantic Trust Co. v. Dana*, 128 Fed. 209), but did not do so. This fund was not the property of the Transit Company, and hence appellant did not have a lien upon it, for appellant's only lien is that of the statute, which purports to give a lien only upon the property of the defendant; and which purports further, we might add, to give a lien only upon the corpus of the defendant's property. The fund in question was a trust fund, at all times in the sole control, and at the sole disposal of the court. It was in *custodia legis*, and the lien of the statute could not reach it. Such a fund is held and is to be distributed according to the principles of equity, and as such equities existed at the beginning of the action.

Mercantile Trust Co. v. Southern States Land & Timber Co., C. C. A., 5th Cir., 86 Fed. 711, citing page 721.

Statutes like that of 1913, heretofore quoted, only extend to, and create a lien upon, the corpus of a defendant's property. They are of no further or higher force and effect than a mortgage executed by a mortgagee upon the body of his property. It is not the intent of such statutes to create liens upon funds accumulated by courts in equity proceedings, and which funds are being handled and distributed by such courts according to the principles of equity. Such funds, indeed, as has heretofore been pointed out, are not the property of the de-

fendant, but constitute a fund of a trust nature, to be disbursed to creditors by the court and as the principles of equity may require. A clear distinction exists between right of priority to or in a fund, and a lien on the fund. It must be, that under statutes which give judgments for damages priority over existing mortgages, that the result can be no different than if the statute made second mortgages for some things prior to a first mortgage. In neither case would the statute or second mortgage be construed to be a lien of its own vigor on a fund accumulated by and in the hands of the court, but they would have priority, and be entitled to first payment, and in full, from the assets.

Had neither party hereto taken any action in the receivership proceeding to impound the fund by intervention, such fund would have been held by the court and distributed by it in due time as the court might determine priorities.

In *Hitz v. Jenks*, 123 U. S., page 297, it is said:

“It is argued for the appellant that by the rule affirmed in *Teal v. Walker*, 111 U. S. 242, a mortgagee is not entitled to rents and profits until he has been lawfully put in possession of the land; and that Keyser, having been admitted into possession by Hitz only, cannot hold the rents and profits against Mrs. Hitz. The conclusive answer to this argument is that the accruing rents were not received and held by Keyser by virtue of an agree-

ment with Hitz; but the Court, through Keyser, as its receiver, took possession of these rents in order to preserve them for the party who should ultimately prevail in the suit."

Also in the case of *Shepherd v. Pepper*, 133 U. S. 626, citing page 652, the court says:

"The court, through its receiver, took possession of the rents in order to preserve them for that party to the suit who should ultimately be found to be equitably entitled to them."

Prior to the intervention of appellant, she occupied, as to the appellee Trust Company, the position of a mortgagee in a second mortgage on real estate. Both appellant and the Trust Company were lien holders on the corpus of the property, and in the absence of any other parties were entitled to share in the proceeds of the estate in the order of their priority. Now by intervening on the first day of April, 1920, did the appellant, who held a second lien on the property which had earned the fund, and who had no lien on the fund, acquire by intervention a right to the fund, superior to the trustee who held a first lien on the property. We think it could hardly be that by such intervention appellant could obtain any right whatever on the fund theretofore accumulated, but could only at most impound the income from the date of intervention onward. On what theory of law could appellant, who held a second lien on the corpus of the property, by the mere process of interven-

tion, fix a first lien on a fund already accumulated in the hands of the court? Prior to intervention appellant had no lien on this fund, and surely by intervening she could acquire no lien. Her entire rights were secondary and inferior. If it be that the holder of a first and prior mortgage lien must, in order to acquire a lien upon the income as such, impound such income by adequate proceeding, and if this can only apply to income thereafter accruing, how much more must the same principle apply to one who holds a second lien on the body of the property, but who, like the first mortgagee, has no lien on the income? It would of necessity appear to be true that what would apply to a mortgagee holding a first lien would also apply to a mortgagee or lien holder having a second right, and that if the prior lien holder, as just stated, in order to fasten a lien upon the income, must take some action toward impounding such income, then, as already stated, certainly the holder of a second lien can only hold the income after he has taken such action. It would further unquestionably be true, as stated by Judge Van Deventer, in the case cited, *supra*, that the prior mortgagee having a vested right to come in and impound the income, that when he did do so, such right would supersede any impounding theretofore made by one holding a second lien and who was second in right.

It would appear therefore that neither the Trustee nor the appellant had a lien upon the fund accumulated in the hands of the court; that appellant's right to an

equitable lien must be confined to income as such, and to income after impounding by her and prior to the time when the Trust Company impounded the income. This income, as appears from the record, has already been paid to the appellant.

Whether the Trust Company was entitled to the accumulated fund or the Light Company was entitled to it, is not material here, as neither has appealed. The only question presented upon this appeal is as to whether this fund should have been paid, and at that time, to the appellant. The court ordered the fund used to preserve the property. As the appellant was not entitled to the fund, and would not receive it on the final winding up of the receivership proceedings, and as neither the Trustee nor the Light Company have complained, the appeal must fail.

There is no evidence in the record as to the value of the property of the Transit Company, but it does appear that the company owns about four miles of track, some cars, and a city lot. The city of Tucson, where this company does business, has a population of approximately twenty thousand. We think it a fair inference, to be deduced from this evidence, together with the fact that the company has been unable to earn interest for the bondholders since 1906, that the property is not sufficient in value to pay the bondholders, principal and interest; in other words, to satisfy the first and prior lien on the property. It would follow, therefore, that

if the fund in question were diverted to pay the appellant's claim, that money necessary to satisfy the claim of the first lienor would be paid to satisfy a claim of a second lienor, neither party having impounded the fund as it accumulated, and it having passed from a technical income into a fund to be distributed by the court either in final winding up according to priorities, or for the preservation of the estate.

As stated in a case. cited by appellant, *Fosdick v Schall*, 9 Otto 235, "He (receiver) holds, pending the litigation, for the benefit of whosoever in the end it shall be found to concern. That in the meantime the court proceeds to determine the rights of the parties upon the principle it would if no change of possession had taken place." If no change in possession had taken place in this case, certainly the Trustee, with a first lien upon all the property, would have been entitled to priority to the proceeds from all the property before the appellant, with a second lien, would have been entitled to anything.

The contention of appellant, as set forth in Paragraph three, on page 27 of her brief, is that the Statute of Arizona of 1913, already cited, namely, Sec. 3634, of its own vigor, gave her a lien on the fund in question superior to that of the Trustee's. We think this contention incorrect, and not sustained by the authorities cited. As before pointed out, the statute is only effective as to mortgages executed after 1913; as to mortgages executed prior thereto, it does not purport to affect. As

all of the property of the Transit Company was covered by the mortgage here, the statute has no application. But the cases cited by appellant sustain the contentions heretofore made by us in this brief.

In *Thomas v. Cincinnati N. O. & T. P. Ry. Co.*, 91 Fed. 202, opinion by Taft, Circuit Judge, the facts were: Under the Enabling Act of Kentucky of 1872, under which the Cincinnati Railway was built through that state, local creditors obtaining judgments against a lessee of the road for wages, material or supplies, or for damages or injuries to persons, were *given a priority*, in the nature of a lien on the rolling stock, superior to any mortgage thereon. Under the Tennessee Act of 1877, relating to railroad companies, and under which one of the railroads in question in the suit was built, local creditors for wages, supplies, damages or injuries, were given *a priority* over mortgages.

Thomas v. Cincinnati, etc., 91 Fed. 195-196.

These acts were passed long prior to the time when the questions involved in the case arose. By the operation of the road a surplus fund had accumulated in the hands of the receiver, and the question arose whether or not this fund was for distribution to creditors generally, or whether the whole of it should be applied to the local creditors claiming priority by virtue of the statutes giving them a preference. The question is entirely one of priorities. The court, after commenting upon the facts, and stating that his first impressions as to the law were erroneous, says:

“Now a creditor’s bill is merely an equitable levy and execution for the benefit of all creditors, secured and unsecured, and the question of priority is to be settled in the same manner as if execution at law had been levied, at precisely the same time, as upon judgments duly rendered, for all claims found by the court to be just. By such an equitable levy and execution as the filing of this bill and the seizure of the property, therefore, the judgments in Tennessee and Kentucky of the favored class are given a priority very like that of a senior lien over the trustees’ lien, upon the property of the defendant company in those states, and the trustees have a lien prior to the lien of all other creditors. The surplus of earnings from the operation of the railroad property, over and above the cost of operating, belongs to the creditors, for whose benefit the creditors’ bill has been filed in the same order of priority as must be preserved upon the principles of equity in the distribution of the proceeds of the property operated upon sale. This must be so. Otherwise the operation of the property could not be for the equal benefit of all creditors.

“It follows, therefore, that because, out of the proceeds of sale of 187/338 of the leasehold and rolling stock of the defendant company, the Tennessee creditors must be paid prior to mortgage or lien claims of the trustees for rent, and to all other claims, they must be accorded the same priority in

respect of that same proportion of the net earnings."

Applying this reasoning to the facts here, it must follow that appellant would not be entitled to the fund in question. The statute in Arizona is just the opposite of that in Tennessee and Kentucky, and in effect provides that judgments for personal injuries shall not be prior to mortgages executed prior to the passage of the Act. The Trustee's lien therefore and claim is a senior lien and superior to the ordinary judgment lien of the appellant. The surplus earnings, therefore, would be applied to the payment of the senior and prior lien and claim, the same as would be done out of the proceeds of a sale of the corpus of the property.

The statement quoted by appellant from *Wiswall v. Sampson*, 14 Howard, 52, on page 32 of her brief, but adds force to our contention. The law gives priority to the senior lien, namely that of the Trustee, which lien equity will not destroy. On the same page we note a statement, made by appellant, to this effect, speaking of a receiver: "Money in his hands is in *custodia legis* for whoever can make out a title to it." We think this is correct. Such a fund is not the property of defendant in the receivership proceedings, as we have already pointed out. It is a trust fund in the hands of the court, and to be distributed as the court may direct, according to the principles of equity. We find, upon looking up the case of *Booth v. Clark*, 17 Howard, 332, citing page 331, that the statement, "The money in his hands is in *custodia legis* for whoever can make out a

title to it," is an extract from the opinion of the court in that case.

The case of *American Bridge Co. v. Heidelberg*, 94 U. S. 798, quoted in full by appellant in her brief, is not in point. In that case, default was made in a mortgage, and the mortgagee filed his bill, setting forth that the company had on hand money and claims due to it, *and which had accrued and accumulated prior to the petition for an appointment of receiver*, and which he prayed might be applied to his mortgage. It was held that in as much as the mortgagee had not taken possession, his claim to the earnings and income on hand at the time of filing the bill must be postponed to an execution of a judgment creditor. This case and a long line of cases in the Supreme Court of the United States following it, namely, *Teal v. Walker*, 111 U. S. 242, and many others, are all to the effect that a mortgagee, in order to become entitled to the rents and profits, must take possession. But that is not the case here. The fund in controversy here did not exist at the time the receiver was appointed. This fund consists of money accumulated by the receiver in the operation of the property. The case of *American Bridge Co., Teal v. Walker*, and other cases of like kind, are clearly distinguished by the Supreme Court of the United States, in *Hitz v. Jenks*, 123 U. S., page 297, citing page 306, where it is said:

"It is argued for the appellant that by the rule affirmed in *Teal v. Walker*, 111 U. S. 242, a mortgagee is not entitled to rents and profits until he has

been lawfully put in possession of the land; and that Keyser, having been admitted into possession by Hitz only, cannot hold the rents and profits against Mrs. Hitz. The conclusive answer to this argument is that the accruing rents were not received and held by Keyser by virtue of an agreement with Hitz; but the court, through Keyser, as its receiver, took possession of these rents in order to preserve them for the party who should ultimately prevail in the suit, etc.”

We do not agree with counsel for appellant as to their conclusions in the forfeiture of the Transit Company's franchise. The right of forfeiture is one of contract, and we do not believe that right is impaired or rendered unenforceable by receivership proceedings. The money expended by this court for such a purpose is in the nature of money expended to prevent waste and dissipation of the company's assets, and for such purposes we believe the court may even go to the extent of displacing prior liens.

There is also excellent authority that the Light Company, by reason of its creditor's bill, has a claim on the fund in question.

Sage v. Memphis & Little Rock R. R. Co., 125 U. S. 361.

It must follow from what has been said, and under the facts here, appellant was not entitled to the surplus

earnings accumulated by the court prior to the intervening petition of appellant, and this being the only error assigned and no other person complaining, the judgment of the lower court should be affirmed.

Respectfully submitted.

SAMUEL L. KINGAN,
JOHN H. CAMPBELL,
ARCHIE R. CONNER.

Attorneys for Appellees.

United States
Circuit Court of Appeals
For the Ninth Circuit.

STERLING TIRE CORPORATION, a Corporation,
Plaintiff in Error,
vs.

JOHN M. SULLIVAN, as Receiver of an Alleged Copartner-
ship Consisting of E. E. GERLINGER and G. R.
HICKOK and Trading Under the Fictitious Name of
STERLING TIRE COMPANY OF CALIFORNIA,
and E. E. GERLINGER, Intervenor,
Defendants in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the
United States District Court of the
Northern District of California,
Second Division.

FILED
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P. D. MCINTOSH
CLERK

United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

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EDGAR D. PEIXOTTO, Esq., Nevada Bank Bldg.,
San Francisco, Calif.,

Attorney for Defendant.

ROY A. BRONSON, Esq., 68 Post St., San Fran-
cisco, Calif.,

Attorney for Intervenor.

In the Southern Division of the District Court of the
United States, Northern District of California,
Second Division.

STERLING TIRE CORPORATION,

Plaintiff,

vs.

JOHN M. SULLIVAN, as Receiver of an Alleged
Copartnership Consisting of E. E. GERLIN-
GER and G. R. HICKOK and Trading Un-
der the Fictitious Name of STERLING
TIRE COMPANY OF CALIFORNIA.

Defendant.

Complaint for Replevin.

Comes now the plaintiff above named and for
cause of action against the defendant above named al-
leges and says:

I.

That defendant is now and was at all of the times
herein stated a corporation organized and existing

and doing business under and by virtue of the laws of the State of New Jersey, and was at all of said times and now is a citizen and resident of the United States and of said State of New Jersey.

II.

That defendant is now and was at all of the times herein stated a citizen and resident of the United States and of the State of California.

III.

That the defendant above named, John M. Sullivan, by order duly given and made on the 6th day of May, 1920, by the Superior Court of the State of California in and for the City and County of San Francisco, in an action therein pending in which one E. E. Gerlinger was and is the plaintiff, and one G. R. Hickok was and is the defendant, action No. 106,555, [1*] was appointed Receiver of all of the assets and property of an alleged copartnership consisting of said E. E. Gerlinger and said G. R. Hickok, and trading under the fictitious name and style of Sterling Tire Company of California; and by said order said Receiver was authorized and directed to take possession of all of the assets and property of said alleged copartnership. That said John M. Sullivan qualified as such Receiver, and thereafter and on or about the 7th day of May, 1920, took possession of the property hereinafter described, being property owned by plaintiff above named and to the possession of which plaintiff was at said time, ever since has been, and is now, entitled.

IV.

That the matter in controversy herein exceeds, exclusive of interest and costs, the sum or value of \$50,000.

V.

That on or about the 7th day of May, 1920, plaintiff was and now is the owner and entitled to the possession of the following described personal property located in the City and County of San Francisco, State of California:

Cord Casings.		Tubes.		Fabric Casings.
4 40 x 8	8	28 x 3	—29 x 3½	5 35 x 5
4 38 x 7	55	30 x 3		8 33 x 5
30 36 x 6	298	30 3½—31 x 4		8 36 x 4½
21 37 x 5	30	33 x 4		16 35 x 4½
6 36 x 5	82	32 x 3½—33 x 4		9 34 x 4½
213 35 x 5	10	33 x 4½		10 33 x 4½
78 33 x 5	47	32 x 4 —33 x 4½		7 32 x 4½
37 36 x 4½	31	32 x 4½—33 x 5		44 34 x 4
81 35 x 4½	79	34 x 4½—35 x 5		22 33 x 4
83 34 x 4½	25	36 x 4½—37 x 5		36 32 x 4
72 33 x 4½	4	38 x 7		9 31 x 4
190 32 x 4½	4	40 x 8		99 32 x 3½
191 34 x 4	20	34 x 4 —35 x 4½		248 30 x 3½ Standard
199 33 x 4	30	36 x 6		215 30 x 3½ Trojan
242 32 x 4	—			290 30 x 3½ Super
100 32 x 3½	723			5 29 x 3½
46 30 x 3½				85 30 x 3
—				6 28 x 3
1597				1122 [2]

That said personal property is of the value of \$100,000.

VII.

That said defendant, on or about the 7th day of

May, 1920, without plaintiff's consent, and wrongfully, took possession of said personal property, and still retains possession thereof, and claims to be entitled to the possession thereof as Receiver of the aforesaid alleged copartnership.

VIII.

That prior to the commencement of this action plaintiff demanded of defendant the possession of said personal property, and the whole thereof, but to deliver the possession thereof defendant refused and still refuses.

IX.

That defendant still unlawfully withholds and retains said personal property from the possession of plaintiff, to plaintiff's damage in the sum of \$100,000.

X.

That in the pursuit of the possession of said personal property, and in its efforts to regain the possession thereof, plaintiff has incurred liability and suffered damage in the sum of \$5,000.

XI.

That said property has not been taken for a tax, assessment, or fine, pursuant to a statute, or seized under an execution or an attachment against the property of plaintiff.

XII.

That prior to the commencement of this action plaintiff obtained permission from the Superior Court of the State of California in and for the City and County of San Francisco, in the aforesaid action of E. E. Gerlinger vs. G. R. Hickok, in which the above-named defendant was appointed Receiver, that

plaintiff herein could bring such action against said Receiver as it might be advised. [3]

WHEREFORE, plaintiff demands judgment against the defendant above named for the recovery of the possession of said personal property, or for the sum of \$100,000, the value thereof, in case a delivery cannot be had, together with \$5,000 damages, and for costs of suit, and for such further relief as may be equitable.

HOWARD HARRON,
McNAIR & STOKER,
Attorneys for Plaintiff.

State of California,
City and County of San Francisco,—ss.

Geo. E. Stoker, being first duly sworn, deposes and says: That he is one of the attorneys for plaintiff in the above-entitled action, and that this affiant has his office in the City and County of San Francisco, State of California. That the plaintiff in said action, Sterling Tire Corporation, is a corporation organized and existing under the laws of the State of New Jersey, and plaintiff and each and all of the officers of plaintiff are absent from the said City and County of San Francisco, and are therefore unable to verify the foregoing complaint; and for that reason this verification is made by this affiant. That this affiant has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

GEO. E. STOKER.

Subscribed and sworn to before me this 10th day of June, 1920.

[Seal]

KATHRYN E. STONE,
Notary Public. [4]

[Endorsed]: Filed Jun. 11, 1920. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [5]

(Title of Court and Cause.)

Requisition to Take Property from Defendant.

To the United States Marshal, Southern Division of
the Northern District of California:

You are hereby required to take from the defendant above named the property described in the within affidavit.

Dated, June 10, 1920.

HOWARD HARRON,
McNAIR & STOKER,
Attorneys for Plaintiff. [6]

(Title of Court and Cause.)

Affidavit on Replevin.

State of California,

City and County of San Francisco,—ss.

Geo. E. Stoker, being duly sworn, says: That he is one of the attorneys for the plaintiff in the above-entitled action; that plaintiff is the owner of the property claimed in this action, which is described as follows:

Cord Casings.		Tubes.		Fabric Casings.	
4	40 x 8	8	28 x 3 — 29 x 3½	5	35 x 5
4	38 x 7	55	30 x 3	8	33 x 5
30	36 x 6	298	30 3½—31 x 4	8	36 x 4½
21	37 x 5	30	33 x 4	16	35 x 4½
6	36 x 5	82	32 x 3½—33 x 4	9	34 x 4½
213	35 x 5	10	33 x 4½	10	33 x 4½
78	33 x 5	47	32 x 4 — 33 x 4½	7	32 x 4½
37	36 x 4½	31	32 x 4½—33 x 5	44	34 x 4
81	35 x 4½	79	34 x 4½—35 x 5	22	33 x 4
83	34 x 4½	25	36 x 4½—37 x 5	36	32 x 4
72	33 x 4½	4	38 x 7	9	31 x 4
190	32 x 4½	4	40 x 8	99	32 x 3½
191	34 x 4	20	34 x 4 — 35 x 4½	248	30 x 3½ Standard
199	33 x 4	30	36 x 6	215	30 x 3½ Trojan
242	32 x 4	—		290	30 x 3½ Super
100	32 x 3½	723		5	29 x 3½
46	30 x 3½			85	30 x 3
<hr/>				6	28 x 3
1597				<hr/>	
				1122	

That plaintiff is entitled to the immediate possession of all of the foregoing property.

That said property is now in the possession of, and wrongfully detained by, the defendant herein; that, according to the best knowledge, information and belief of this affiant the alleged cause of such detention of said property is that one E. E. Gerlinger claims the existence of a copartnership between himself and one G. R. Hickok, trading under the fictitious name and style of Sterling Tire Company of California, and that said alleged copartnership has some contract with the plaintiff [7] above named whereby said alleged copartnership is entitled to the possession of said property with the right to sell the same upon certain terms and conditions, and that said Gerlinger commenced an action in the

Superior Court of the State of California in and for the City and County of San Francisco for the dissolution of said alleged copartnership and for the appointment of a receiver to take possession of the assets of said alleged copartnership and to carry on the business thereof, and that said Superior Court, in said action, appointed said defendant as such Receiver for the purposes stated, and acting as such Receiver said defendant took possession and retains possession of said property; but plaintiff denies the existence of any contract between it and said alleged copartnership, or with any other person, whereby the ownership or possession, or right of possession, of the property described is in any manner involved.

That neither said property nor any part thereof has been taken for a tax, assessment or fine pursuant to a statute; or been seized under an execution or an attachment against the property of the plaintiff.

That the actual value of the property is \$100,000.

GEO. E. STOKER,

Subscribed and sworn to before me this 10th day of June, 1920.

[Seal]

KATHRYN E. STONE,

Notary Public. [8]

Marshal's Return.

I hereby certify and return, that on the 16th day of June, 1920, I executed the order indorsed hereon, for delivery of the personal property mentioned in the within affidavit, by taking possession all of such property to be found within my district, to wit:

Cord Casings.		Tubes.		Fabric Casings.
4 40 x 8	8	28 x 3	—29 x 3½	3 35 x 5
4 38 x 7	55	30 x 3		9 33 x 5
30 36 x 6	299	30 x 3		7 36 x 4½
212 37 x 5	29	33 x 4		16 35 x 4½
4 36 x 5	81	32 x 3½—33 x 4		9 34 x 4½
211 35 x 5	11	33 x 4½		10 33 x 4½
74 33 x 5	47	32 x 4 —33 x 4½		8 32 x 4½
38 36 x 4½	31	32 x 4½—33 x 5		44 34 x 4
81 35 x 4½	78	34 x 4½—35 x 5		24 33 x 4
81 34 x 4½	25	36 x 4½—37 x 5		38 32 x 4
70 33 x 4½	4	38 x 7		9 31 x 4
188 32 x 4½	4	40 x 8		99 32 x 3½
186 34 x 4	18	34 x 4 —35 x 4½		216 30 x 3½) Standard
197 33 x 4	30	36 x 6		244 30 x 3½) Trojan
240 32 x 4				292 30 x 3½) Super
100 32 x 3½				6 29 x 3½
43 30 x 3½				85 30 x 3
				6 28 x 3
1572	720			1125

Old tires.—2 34 x 4 and 1 30 x 3½
and at the same time I delivered to John Feeny, Deputy Receiver (acting for the defendant John M. Sullivan, Receiver of an alleged copartnership consisting of E. E. Gerlinger and G. R. Hickok and trading under the fictitious name of Sterling Tire Company of California), a copy of the within affidavit and order, and undertaking duly approved by me, and defendant having failed to except to the surety therein, and also having omitted to require a return of said property, and no other person than the defendant having made claim thereto, I did at the expiration of the time prescribed by the statute for seeking such delivery and making such claim, to wit, on the 25th day of June, 1920, deliver the property so

taken to the plaintiff, as by said order I am commanded.

J. B. HOLOHAN,
U. S. Marshal.
By G. White,
Deputy. [9]

[Endorsed]: United States Marshal's Office. San Francisco, California. Received Jun. 11, 1920, 12 M. J. B. Holohan, U. S. Marshal. By G. White, Deputy. [10]

FIDELITY AND DEPOSIT COMPANY OF
MARYLAND.

HOME OFFICE: BALTIMORE, MARYLAND.

PACIFIC DEPARTMENT OFFICE.

601 Insurance Exchange Building,
San Francisco, Cal.

(The premium charged for this bond is \$1000.00
Dollars per annum.)

(Title of Court and Cause.)

(Replevin Bond.)

WHEREAS, it is alleged by the plaintiff in the above-entitled action that the defendant in said action has in his possession and unjustly detains certain personal property belonging to said plaintiff to the said possession of which the said plaintiff is lawfully entitled, of the value of One Hundred Thousand and 00/100 (\$100,000.00) Dollars, and

WHEREAS, the said plaintiff being desirous of having the said personal property delivered to it and by endorsement in writing upon the affidavit has required the marshal of San Francisco, State of California, to take the said property from said defendant;

NOW, THEREFORE, we, Sterling Tire Corporation, as principal, and Fidelity and Deposit Company of Maryland, a corporation created, organized and existing under and by virtue of the laws of the State of Maryland and duly licensed for the purpose of making, guaranteeing or becoming surety upon bonds or undertakings required or authorized by laws of the State of California, as surety, hereby agree and undertake and are bound to said defendant and to E. E. Gerlinger, individually and as a member of an alleged copartnership trading under the fictitious [11] name of Sterling Tire Company of California, in consideration of said delivery, in the sum of Two Hundred Thousand and 00/100 (\$200,000.00) Dollars, being double the value as stated in the plaintiff's affidavit herein for the prosecution of the action, for the return of the property to the said defendant, if return thereof be adjudged, and for payment to the said defendant and to said E. E. Gerlinger, individually and as a member of the aforesaid alleged copartnership, of such sum as may, for any cause, be recovered against said plaintiff.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 10th day of June, A. D. 1920.

STERLING TIRE CORPORATION, (Seal)
FIDELITY AND DEPOSIT COMPANY
OF MARYLAND. (Seal)

By C. H. BENNETT,
Attorney-in-fact.

Attest: A. C. HOEPNER,
Agent.

This undertaking is hereby approved this 24th day of June, 1920.

J. B. HOLOHAN,
U. S. Marshal.
By G. White,
Deputy.

United States Marshal's Office.
San Francisco, California.

Received Jun. 24, 1920, 11 A. M.

J. B. HOLOHAN,
U. S. Marshal.
By G. White,
Deputy.

[Endorsed]: Filed Jul. 8, 1920. Walter B. Mal-
ing, Clerk. [12]

(Title of Court and Cause.)

Answer to Complaint.

Comes now the defendant, John M. Sullivan, as Receiver of an alleged copartnership consisting of

E. E. Gerlinger and G. R. Hickok and trading under the fictitious name of Sterling Tire Company of California, and answering the complaint of plaintiff herein, admits, alleges and denies as follows, to wit:

I.

Admits the allegations of paragraph I and II of plaintiff's complaint and the allegation of paragraph III down to and including the words "hereinafter described" in line 11 page 2, and denies that the property was owned by plaintiff, and denies that plaintiff was entitled to the possession of said property, and in this behalf defendant alleges that this defendant took possession of said property as said Receiver under and by virtue of said order appointing him Receiver, and was holding said property under said order of said Court appointing him said Receiver pending the determination by said Court of said action and the rights of the parties thereto and the rights to the possession thereof.

II.

Defendant admits the allegation of paragraph IV.

III.

Defendant alleges he has no information or belief sufficient to enable him to answer paragraph V, and placing his denial on said grounds, defendant denies that on or about the 7th day of May, 1920, or at any time or at all, plaintiff was and/or now is the owner, and/or entitled to the possession of the personal property described in paragraph V, and in this behalf defendant alleges that said defendant claimed possession and was in the possession of said property, and entitled to the [13] posses-

sion of said property by reason of the receivership as hereinbefore and in said complaint alleged.

IV.

Defendant admits the allegation of paragraph VI.

V.

Defendant denies that on or about the 7th day of May, 1920, or at any time at all without plaintiff's consent defendant wrongfully took possession of said personal property, and/or still retains possession thereof, and defendant admits that defendant claims to be entitled to the possession of said personal property as Receiver of the aforesaid alleged copartnership, and by reason of his appointment and the orders of Court made as in said complaint alleged in paragraph III thereof.

VI.

Defendant admits the allegations of paragraph VIII.

VII.

Defendant denies the allegations of paragraph IX that defendant still unlawfully holds and/or retains said personal property from the possession of plaintiff to plaintiff's damage in the sum of \$100,000.00, or in any sum or amount whatsoever.

VIII.

Defendant denies that in the pursuit of the possession of said personal property, and/or in his efforts to regain the possession thereof, plaintiff has incurred liability or suffered damage in the sum of \$5000.00, or in any sum or amount whatsoever.

IX.

Defendant admits the allegations of paragraph XI

and in this behalf alleges that said property was taken by defendant under and by virtue of his appointment as Receiver, and under the orders of the Superior Court of the City and County of [14] San Francisco made in said action No. 106555 as alleged in plaintiff's complaint.

X.

Defendant denies that prior to the commencement of this action, plaintiff obtained permission from the Superior Court of the State of California, in and for the City and County of San Francisco, in said action paragraph XII named, that plaintiff herein could bring said action against said Receiver as it might be advised.

XI.

Defendant alleges that said action No. 106,555, Superior Court of the City and County of San Francisco, and referred to in paragraph III of plaintiff's complaint, is still pending and undetermined, and that there is pending and undetermined a motion and proceeding to fix the compensation of said defendant as Receiver and his attorney, Edgar D. Peixotto; that said defendant as such Receiver has not had his account with reference to the receivership settled and allowed in said action, and that there are various sums of money due to him for expenses of the receivership and property chargeable against said property, all of which are yet undetermined by said Superior Court in said action; that defendant claims a lien upon the property mentioned in plaintiff's complaint and which he is entitled to the possession of

for the payment of his fees as Receiver, fees incurred for attorney, expenses and disbursements incurred in the Receivership.

And for further and separate defense, defendant alleges that this Court has no jurisdiction of the person of the defendant, or of the subject of the action.

WHEREFORE, defendant prays that plaintiff take nothing by the said complaint, that the possession of said personal property be returned to defendant, and for such other and [15] further relief as may be meet and proper and equitable, and for costs of suit.

EDGAR D. PEIXOTTO,
Attorney for Defendant.

State of California,
City and County of San Francisco,—ss.

John M. Sullivan, being duly sworn, deposes and says: That he is the defendant in the above-entitled action; that he has read the foregoing answer to complaint and knows the contents thereof, that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

JOHN M. SULLIVAN.

Subscribed and sworn to before me this 10th day of September, 1920.

[Seal] ALICE SPENCER,
Notary Public in and for the City and County of
San Francisco, State of California.

Due service and receipt of copy of the within answer is hereby admitted this 10th day of September, 1920.

HOWARD HARRON and
McNAIR & STOKER,
Attorneys for Plaintiff.

[Endorsed]: Filed Sept. 10, 1920. Walter B. Maling, Clerk. [16]

(Title of Court and Cause.)

Order Granting Leave to Intervene.

Comes now E. E. Gerlinger and moves the above-entitled court for leave to intervene in the above-entitled action and to file his verified complaint in intervention therein, and it appearing to the Court from said complaint in intervention that the said E. E. Gerlinger has an interest in the matter in litigation in said action and in the success of the defendant therein and other good cause appearing therefor;

IT IS HEREBY ORDERED that the said E. E. Gerlinger have and he is hereby granted leave to intervene in said action and to file his said complaint in intervention herein.

Dated: this 10th day of September, 1920.

M. T. DOOLING,
Judge of said District Court.

[Endorsed]: Filed Sept. 10, 1920. Walter B. Maling, Clerk. [17]

(Title of Court and Cause.)

Complaint in Intervention.

Now comes E. E. Gerlinger and by leave of Court first had and obtained intervenes in the above-entitled action and files this as his complaint in intervention, and as and for the grounds of his said intervention complains and alleges:

I.

That said E. E. Gerlinger and G. E. Hickok, at all times herein mentioned have been and now are copartners doing business under the fictitious firm name and style of Sterling Tire Company of California.

II.

That plaintiff herein, Sterling Tire Corporation, is a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey.

III.

That on or about the 20th day of April, 1920, said G. R. Hickok for and on behalf of said Sterling Tire Company of California, a copartnership, entered into a contract with said Sterling Tire Corporation, plaintiff herein, wherein and whereby the said Sterling Tire Corporation agreed to consign to said Sterling Tire Company of California the following personal property consisting of automobile tires, tubes and casings, more particularly described, as follows, to wit: [18]

Cord Casings.	Fabric Casings.	Tubes.
4 40 x 8	5 35 x 5	8 28 x 3 —29 x 3½
4 38 x 7	8 33 x 5	55 30 x 3
30 36 x 6	8 36 x 4½	298 30 3½—31 x 4
21 37 x 5	16 35 x 4½	30 33 x 4
6 36 x 5	9 34 x 4½	82 32 x 3½—33 x 4
213 35 x 5	10 33 x 4½	10 33 x 4½
78 33 x 5	7 32 x 4½	47 32 x 4 —33 x 4½
37 36 x 4½	44 34 x 4	31 32 x 4½—33 x 5
81 35 x 4½	22 33 x 4	79 34 x 4½—35 x 5
83 34 x 4½	36 32 x 4	25 36 x 4½—37 x 5
72 33 x 4½	9 31 x 4	4 38 x 7
190 32 x 4½	99 32 x 3½	4 40 x 8
191 34 x 4	248 30 x 3½ Standard	20 34 x 4 —35 x 4½
199 33 x 4	215 30 x 3½ Trojan	30 36 x 4
242 32 x 4	290 30 x 3½ Super	
100 32 x 3½	5 29 x 3½	
46 30 x 3½	85 30 x 3	
	6 28 x 3	

That it was provided in and by the terms of said agreement that said personal property and the whole thereof would be consigned to said Sterling Tire Company of California for a period of one hundred and twenty (120) days, and that in the meantime said Sterling Tire Company of California would have the right to the possession thereof and the right to sell the same for a profit; it was further provided in and by the terms of said contract that said Sterling Tire Company of California should pay for all tires, tubes and casings delivered from the consigned stock, on the first day of each week following delivery and that said Ster-

ling Tire Company of California should pay to the said Sterling Tire Corporation therefor, the regular published trade list price of said property less than twenty per cent (20%), five per cent (5%) and five per cent (5%).

IV.

Thereafter and on or about the 28th day of April, 1920, pursuant to the terms and conditions of said contract, said Sterling Tire Corporation, plaintiff herein, delivered to said Sterling Tire Company of California the said personal property hereinabove described and the whole thereof. [19]

V.

That the property hereinabove described is the same property described in plaintiff's complaint herein.

VI.

That the said E. E. Gerlinger, plaintiff in intervention herein, heretofore and upon the 7th day of May, 1920, commenced an action in the Superior Court of the State of California, in and for the City and County of San Francisco against said G. R. Hickok, which said action is numbered 106,555 in the records of the County Clerk of said City and County of San Francisco, for the dissolution of said copartnership and for the appointment of a receiver over the property and assets thereof pending the litigation; thereafter and on or about the 7th day of May, 1920, by an order duly given and made, the said Superior Court appointed John M. Sullivan, defendant herein, receiver of the prop-

erty and assets of said copartnership which said property and assets included the right to sell and to the possession of the tires, tubes and casings hereinabove described, subject only to a requirement to account for a portion of the proceeds of the sale thereof as in said contract provided; that thereafter and on or about the 10th day of May, 1920, said receiver took possession of the property and assets of said copartnership pursuant to said order of Court and took possession of the tires, tubes and casings hereinabove described and described in plaintiff's complaint.

VII.

That at the time of the commencement of this action said contract between said Sterling Tire Corporation, plaintiff herein, and said Sterling Tire Company of California, a copartnership, was in full force and effect, not rescinded, canceled or annulled, and said copartnership, the Sterling Tire Company of California, had done and performed all of the terms and conditions thereof on its part to be kept and performed up to [20] the said date on which said receiver took possession of the property and assets of said copartnership, and thereafter said Receiver had and has done and performed all of the terms and conditions of said contract on the part of said Sterling Tire Company of California to be kept and performed thereunder, except in so far as he was prevented therefrom by the acts of said Sterling Tire Corporation, plaintiff herein.

WHEREFORE, said E. E. Gerlinger, plaintiff in intervention herein, prays that plaintiff herein take nothing by its said complaint and that judgment be rendered in favor of said John M. Sullivan as said receiver, defendant herein, and for costs of suit herein incurred.

ROY A. BRONSON,
Attorney for Plaintiff in Intervention.

State of California,
City and County of San Francisco,—ss.

Roy A. Bronson, being first duly sworn, deposes and says:

That he is the attorney for E. E. Gerlinger, plaintiff in intervention herein; that he has and maintains his office as such attorney, in the City and County of San Francisco, State of California; that said E. E. Gerlinger is absent from said City and County and at date hereof is unable to make this verification and for that reason affiant makes this verification for and on behalf of said E. E. Gerlinger.

That he has read the foregoing complaint in intervention and knows the contents thereof; and that the same is true of his own knowledge, except as to those matters therein stated on his information and belief and as to those matters [21] he believes it to be true.

ROY A. BRONSON.

Subscribed and sworn to before me this 27th day of August, 1920.

[Seal]

ETTA LAIDLAW,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Sept. 10, 1920. Walter B. Maling, Clerk. [22]

(Title of Court and Cause.)

**Plaintiff's Answer to Complaint in Intervention of
E. E. Gerlinger.**

Comes now the plaintiff above named and for answer to the complaint in intervention filed herein by E. E. Gerlinger admits, denies and alleges as follows:

I.

Alleges that it has no information or belief sufficient to enable it to answer paragraph I of said complaint in intervention, and placing its denial on said grounds, plaintiff denies that said E. E. Gerlinger and G. R. Hickok at all times mentioned in said complaint in intervention, or at all, have been or now are copartners doing business under the fictitious name and style of Sterling Tire Company of California, or otherwise or at all.

II.

Denies that on or about the 20th day of April, 1920, or at any other time, or times, or at all, said G. R. Hickok, for and/or on behalf of said Sterling Tire Company of California, a copartner-

ship, or at all, entered into a contract with plaintiff wherein and whereby, or wherein or whereby, plaintiff agreed to consign to said Sterling Tire Company of California, or to any other person, or at all, the personal property described in paragraph III, of said complaint in intervention, or any part thereof, or any other property of any description whatsoever; and denies that by the terms of said, or any, agreement it was provided that the said personal property, or any part thereof, would be consigned to said Sterling Tire Company of California, or to any other person, or at all, for a period of [23] 120 days, or for any other period of time, or at all, and/or that in the meantime, or at all, said Sterling Tire Company of California, or any other person, would have the right to the possession of said personal property, or any part thereof, and/or the right to sell the same, or any part thereof, for a profit, or otherwise, and further denies that it was further provided by the terms of said contract, or at all, that said Sterling Tire Company of California, or any other person, or at all, should pay for all or any of the tires, tubes and casings, or either thereof, delivered from said alleged consigned stock, on the first day of each week following delivery, or at any other time, or at all, and/or that said Sterling Tire Company of California, or any other person, or at all, should pay to plaintiff therefor the regular, or any, published, or other, trade list price of said property, or any part thereof, less than 20%, 5%, and 5%, or less any percentage, or at all.

III.

Denies that thereafter and on or about the 28th day of April, 1920, or at all, pursuant to the terms and/or conditions of said contract, or at all, plaintiff delivered to said Sterling Tire Company of California, or to any other person, or at all, the said personal property referred to, or any part thereof.

IV.

Denies that the property and assets, or either of them, of said alleged copartnership, included the right to sell and to [24] the possession, or either thereof, of the tires, tubes and casings, or either or any part thereof, in said complaint in intervention described, subject only to a requirement to account for a portion of the proceeds of the sale thereof as in said alleged contract, or otherwise, provided.

V.

Denies that at the time of the commencement of this action said alleged contract, or any contract, between plaintiff and said Sterling Tire Company of California, a copartnership, or any other person, or at all, was in full force and effect, not rescinded, cancelled or annulled, or either thereof, or at all, and denies that said alleged copartnership had done and performed, or done or performed, all or any of the terms and conditions, or terms or conditions, of said alleged contract, on its part to be kept and performed up to the alleged date on which the Receiver referred to in said complaint in intervention took possession of the property and assets

of said alleged copartnership, and further denies that thereafter, or at all, said Receiver has done and performed all or any of the terms and conditions of said alleged contract on the part of said Sterling Tire Company of California, or any other person, to be kept and performed, thereunder or at all; and in this behalf plaintiff alleges that neither at the time of the commencement of this action, nor at any other time, nor at all was there any contractual relation between the plaintiff herein and said Sterling Tire Company of California, an alleged copartnership, of any kind or character whatsoever.

WHEREFORE plaintiff prays that the relief demanded by said E. E. Gerlinger in his said complaint in intervention be denied, and that plaintiff have judgment as prayed in its complaint on file herein.

HOWARD HARRON and
McNAIR & STOKER,

Attorneys for Plaintiff. [25]

State of California,

City and County of San Francisco,—ss.

Geo. E. Stoker, being first duly sworn, deposes and says: That he is one of the attorneys for plaintiff in the above-entitled action, and that this affiant has his office in the City and County of San Francisco, State of California. That the plaintiff in said action, Sterling Tire Corporation, is a corporation organized and existing under the laws of the State of New Jersey, and plaintiff and each and all

of the officers of plaintiff are absent from the said City and County of San Francisco, and are therefore unable to verify the foregoing answer; and for that reason this verification is made by this affiant. That this affiant has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

GEO. E. STOKER,

Subscribed and sworn to before me this 13th day of September, 1920.

[Seal]

H. F. HOBSON.

Notary Public.

Service and receipt of a copy of the within answer hereby acknowledged this 13th day of September, 1920.

ROY A. BRONSON,

Attorney for Intervenor.

[Endorsed]: Filed Sept. 15, 1920. Walter B. Maling, Clerk. [26]

(Title of Court and Cause.)

Stipulation Waiving Jury.

It is hereby stipulated and agreed by and between the parties hereto that the above-entitled action may, with the consent of the Court, be tried by the Court, and that a trial by jury be waived.

Dated: February 23d, 1921.

HOWARD HARRON and
McNAIR & STOKER,

Attorneys for Plaintiff.

EDGAR D. PEIXOTTO,

Attorney for Defendant.

ROY A. BRONSON,

Attorney for Intervenor.

Approved.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Mch. 21, 1921. Walter B.
Maling, Clerk. [27]

(Title of Court and Cause.)

Judgment.

This cause came regularly on for trial this 20th day of May, 1921, before the Court, a jury having been waived by written stipulation of the parties, the plaintiff appearing by Howard Harron, Esq., and McNair & Stoker, its attorneys, the defendant in person, and by Edgar D. Peixotto, his attorney, and the above-named intervenor by Roy A. Bronson, his attorney. Evidence, oral and documentary, was introduced on behalf of the respective parties, and after the arguments of counsel said cause was submitted to the Court for decision, whereupon the Court ordered judgment in favor of the plaintiff and against the defendant for the possession of the property described in plaintiff's complaint, but with-

out damages for its detention, and without costs, subject to the lien, upon said property in the sum of \$2,676.67 in favor of said defendant as adjudged by the Superior Court of the State of California, in and for the City and County of San Francisco, in that certain action therein entitled E. E. Gerlinger vs. G. R. Hickok, numbered 106,555.

It is therefore ORDERED AND ADJUDGED that plaintiff have and recover the possession of all of the property described in plaintiff's complaint herein, without damages for its detention, and without costs, upon the plaintiff paying into Court the sum of \$2,676.67 adjudged as a lien against said property by the Superior Court of the State of California, in and for the City and County of San Francisco, in an action entitled E. E. Gerlinger v. G. R. Hickok, numbered 106,555, in satisfaction of the services of the receiver in said Superior Court and his attorney; or in lieu of such payment into court that the plaintiff pay said sum to the attorney for said receiver and file with the clerk of this court [28] the duly signed receipt of said attorney for such payment.

Judgment entered May 20, 1921.

WALTER B. MALING,

Clerk. [29]

In the Southern Division of the District Court of
the United States, in and for the Northern Dis-
trict of California, Second Division.

No. 16,392.

STERLING TIRE CORPORATION,

Plaintiff,

vs.

JOHN M. SULLIVAN, as Receiver of an Alleged
Copartnership Consisting of E. E. GERLIN-
GER and G. R. HICKOK and Trading
Under the Fictitious Name of STERLING
TIRE COMPANY OF CALIFORNIA,

Defendant.

E. E. GERLINGER,

Intervenor.

Plaintiff's Bill of Exceptions.

BE IT REMEMBERED, that on the 20th day of
May, 1921, the above-entitled cause came on for trial
before the Court, a jury having been waived by
written stipulation of the parties, Honorable Will-
iam C. Van Fleet presiding. The plaintiff appeared
by Howard Harron and McNair & Stoker, its coun-
sel; the defendant appeared in person and by Edgar
D. Peixotto, his counsel; the intervenor appeared
by Roy A. Bronson, his counsel. Thereupon pro-
ceedings were had as follows:

The following facts were proved at the trial, either
by the undisputed evidence or by the admissions of
counsel for the respective parties:

In April, 1920, plaintiff sent its representative, E. R. Northrop, to San Francisco to adjust an unsatisfactory business relation with one Warren, who was plaintiff's agent for the sale of the automobile tires and tubes replevined in this action, Northrop made an adjustment with Warren, and on behalf of the plaintiff accepted from Warren the return of this property.

Northrop then sought a new representative to handle these tires which plaintiff owned. He met E. E. Gerlinger, the intervenor herein, and offered Gerlinger the agency, but the proposition [30] was too big for him to handle. Gerlinger then introduced Northrop to one G. R. Hickok. Negotiations between Northrop, Hickok and Gerlinger led to the formulation of a contract, which provided, in effect, for the consignment by the plaintiff to the Sterling Tire Company of California, upon stated terms and conditions, of these tires and tubes. This contract was signed by Hickok on behalf of the Sterling Tire Company of California, the party of the second part, on April 20, 1920. Northrop immediately forwarded the contract to the plaintiff at its factory and office, in New Jersey, for approval. He delivered possession of the said tires and tubes to the Sterling Tire Company of California, as custodian, pending the acceptance or rejection of the proposed contract by the plaintiff. Plaintiff refused to accept the contract, and it was never executed on behalf of plaintiff.

On May 5, 1920, prior to plaintiff's decision to reject the proposed contract, Gerlinger brought an

action in the Superior Court of the State of California, in and for the City and County of San Francisco, against Hickok, claiming that the Sterling Tire Company of California was the fictitious name of a copartnership consisting of himself and Hickok; that Hickok had refused to recognize him as a partner; that the partnership assets consisted of the contract above referred to, and the right to the possession and sale of the tires and tubes in said contract specified, being the property replevined herein. Gerlinger asked for a dissolution of the alleged copartnership, an accounting, and the appointment of a receiver to take possession of the partnership assets and conduct the partnership business. Plaintiff herein was not made a party to that action.

Hickok answered denying any copartnership relation with Gerlinger; and alleged that the Sterling Tire Company of California was the fictitious name of the National Finance Company, a corporation [31] in which he (Hickok) was interested; and further alleged that the Sterling Tire Company of California merely held possession of the aforesaid tires and tubes as custodian for the Sterling Tire Corporation, plaintiff herein, pending the acceptance or rejection by the Sterling Tire Corporation of the aforesaid proposed contract, but that the Sterling Tire Corporation rejected the contract, and that no contract in fact was ever made between the Sterling Tire Corporation and the Sterling Tire Company of California.

In said action of Gerlinger vs. Hickok the State Court appointed the defendant herein, John M. Sulli-

van, receiver, as prayed by the plaintiff in that cause. This appointment was made without notice to the defendant, but the order was conditioned upon Gerlinger first filing a bond in the sum of \$1,000 to indemnify the defendant (Hickok) against damage in case the appointment of the receiver was procured wrongfully, maliciously or without sufficient cause. The following is a copy of the order of the Court appointing said receiver:

(Title of Court and Cause.)

Upon reading and filing the verified Complaint of plaintiff on file herein and good cause appearing therefor, on motion of Roy A. Bronson, Esq., Attorney for plaintiff herein:

IT IS HEREBY ORDERED that John M. Sullivan be and he is hereby appointed Receiver of the partnership of plaintiff and defendant and of the Sterling Tire Company of California and all of the property and assets thereof, which said partnership and said property and assets thereof are more fully set forth in the Complaint of plaintiff on file herein.

IT IS FURTHER ORDERED that said John M. Sullivan as such Receiver proceed immediately to take possession of the assets of said partnership of plaintiff and defendant and of said Sterling Tire Company of California and until further order of this Court to continue and carry on the business on behalf of said partnership under said firm name and style of Sterling Tire Company of California, of the sale and distribution within the States of California, Nevada and Arizona of the tires and tubes consigned to said partnership and said Sterling Tire Company

of California by the Sterling Corporation, of New Jersey, and to carry out all the terms and conditions of the contract between said Sterling Tire Company of California and said Sterling Tire Corporation, a copy of which said contract is attached to plaintiff's Complaint herein and marked Exhibit "A."

IT IS FURTHER ORDERED that until further order of this Court said John M. Sullivan as such Receiver may pay out and expend out of any moneys realized by him on the sale and distribution [32] of said tires and tubes, as aforesaid, all sums of money necessarily incident to the conducting and carrying on of said business as expenses of said business but said Receiver is hereby directed not to part with or expend in any manner whatsoever any of the proceeds of said business; and

IT IS FURTHER ORDERED that said receiver retain said profits until further order of this Court.

IT IS FURTHER ORDERED that the above order appointing said John M. Sullivan as such receiver as aforesaid is conditioned upon the plaintiff first filing with the clerk of the above-entitled Court an undertaking with sufficient sureties in the sum of \$1000.00 to the effect that the plaintiff will pay to the defendant all damages he may sustain by reason of the appointment of said John M. Sullivan as such receiver and the entry by him upon his duties, in case the plaintiff shall have procured such appointment wrongfully, maliciously or without sufficient cause.

IT IS FURTHER ORDERED that before entering upon his duties, said receiver be sworn to

perform them faithfully and that he file herein an undertaking to the State of California in the sum of \$500.00 to the effect that he will faithfully discharge the duties of receiver in this action and obey the orders of the Court herein.

Done in open Court, this 6th day of May, 1920.

E. P. SHORTALL,

Judge of said Superior Court.

The receiver qualified, and under the aforesaid order appointing him he took possession on May 10, 1920, of the tires and tubes herein involved. The bond referred to in the foregoing order was approved and filed prior to the time the receiver went into possession.

The day following the taking of possession by the receiver, Mr. Harron, attorney for Hickok, went to Judge Shortall's court, and Roy A. Bronson, attorney for Gerlinger, was requested by telephone to attend the conference. Mr. Harron was insisting on a bond in excess of \$1,000. Mr. Bronson pointed out to the Court that plaintiff was only claiming a possessory right and did not claim ownership. Judge Shortall then ordered plaintiff to give an undertaking in the sum of \$5,000 and thereupon Gerlinger put up a bond for \$4,000 in addition to the bond for \$1,000 theretofore filed and approved.

On the motion to discharge the receiver Mr. Harron stated that he had been authorized to represent the Sterling Tire Corporation, and he read

in open court from the witness stand a telegram [33] from the Sterling Tire Corporation of Ruthersford, N. J., authorizing him to act as their attorney and protect their interests. Harron said to the Court that these tires were of great value, and particularly that this property, which the Sterling Tire Corporation claimed Hickok had no right to, was liable to be subjected to proceedings here, and he insisted that the Court make a bond in favor of the Sterling Tire Corporation. Mr. Bronson argued that the Sterling Tire Corporation was not a party to this action and had its proper rights. Harron, however, insisted that the bond be made made not only in favor of the Sterling Tire Corporation but in favor of the National Finance Company, also represented by him. The Court then ordered Gerlinger to give a new bond, in the sum of \$5,000, running not only to Hickok but to the Sterling Tire Corporation and the National Finance Company. The following day, May 18, 1920, Gerlinger complied with this order, and obtained an order releasing the two former bonds. The new bond furnished by Gerlinger was approved by the Court and filed with the clerk, and was in words and figures as follows:

(Title of Court and Cause.)

Whereas, the above-named plaintiff is about to commence an action in the Superior Court of the City and County of San Francisco, State of California, entitled as above, and is about to apply to the Court for the appointment of a receiver to take

possession of the property in the complaint described, and to preserve the same, under the orders of the said Court:

Now, therefore, we the undersigned in consideration of the premises and of the appointment of the receiver herein, do jointly and severally undertake in the sum of \$5,000, and promise to the effect that in case said receiver shall be appointed that plaintiff will pay to said defendant or Sterling Tire Corporation of Rutherford, New Jersey, or National Finance Co., a corporation, such damages, not exceeding the sum of \$5,000, which the defendant or Sterling Tire Corporation of Rutherford, New Jersey, or said National Finance Co., a corporation, may sustain by reason of the appointment of such receiver and the entry by him upon his duties, in case the plaintiff shall have procured such appointment wrongfully.

Dated May 7, 1920.

[Seal] LION BONDING & SURETY CO.

By JESSE M. WHITED,

Its Attorney in Fact.

Hickok moved the State Court to vacate the order appointing [34] the receiver. Said motion was heard on May 19, 1920, and May 21, 1920, and was denied by the Court on May 22, 1920.

On May 24, 1920, the receiver served and filed the following notice of motion:

Notice of Motion of Receiver for Direction and Compensation.

To the Plaintiff, E. E. Gerlinger, and His Attorney Roy A. Bronson, Esq., and to the Defendant G. R. Hickok and His Attorney, Howard Harron Esq.:

Please take notice that on Thursday, the 27th day of May, 1920, at the courtroom of the above-entitled court in the City Hall in the City and County of San Francisco, Department No. 15 thereof at 10 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, John M. Sullivan, the receiver heretofore appointed in the above-entitled action, will make the following motions and will move the Court for the following orders, to wit:

I.

For an order directing the course and conduct of the Receiver with reference to the mode and manner of carrying on the business and upholding the property of the copartnership *pendente lite*.

II.

For an order fixing, determining and securing a reasonable compensation for the receiver *pendente lite*.

III.

For an order fixing, determining and securing a reasonable compensation for Edgar D. Peixotto, attorney for said receiver *pendente lite*.

IV.

For such other and further orders as may be

necessary for the preservation of the property and the conservation of the rights of all the parties *pendente lite*. Said motions will be made upon the grounds that the parties to the action will not agree as to the course and conduct of the receiver, or as to the compensation of the receiver, or his attorney, and that it is for the best interest of the parties that such orders and directions be made.

Said motion will be made upon this notice, and all the papers, files and documents in said cause, and upon such further testimony, oral and documentary, as may be introduced at the hearing thereof.

Dated May 24th, 1920.

(Signed) EDGAR D. PEIXOTTO,
Attorney for John M. Sullivan,
Receiver.

Service of the within notice, etc., and receipt of a copy thereof is hereby admitted this 24th day of May, 1920.

(Signed) ROY A. BRONSON,
Attorney for Plaintiff.

(Signed) HOWARD HARRON,
Atty. for Deft.

The foregoing motion was heard on the 27th day of May, 1920. At the hearing thereof Geo. E. Stoker appeared specially and stated that he had been retained by the Sterling Tire Corporation and was to be associated with Mr. Howard Harron on behalf of the Sterling Tire Corporation, and requested that no order be made [35] respecting the sale or disposition of these tires until he could

communicate with the Sterling Tire Corporation and ascertain their wishes and the facts of the case; that the tires were of great value; that the Sterling Tire Corporation was not a party to the action and did not recognize either Gerlinger's or Hickok's claim of right to the tires, and that a sale of the tires by a receiver might be prejudicial to the business and standing of the Sterling Tire Corporation. Thereupon an order was prepared by the various attorneys and O. K.'d by them. The "Stoker" who O. K.'d the order is the same Stoker who appeared specially as above stated. Said order was signed by the Court, and was as follows:

(Title of Court and Cause.)

Order Directing Receiver in His Duties.

The motion of the Receiver herein for an order directing him as to the management of the business of the alleged copartnership between plaintiff and defendant, and directing him as to the possession of the alleged copartnership property, came on regularly for hearing on this day, all of the parties being present in person and by their respective attorneys.

And it appearing to the Court that the principal asset of said copartnership is a contract alleged by plaintiff to exist between said copartnership, on the one part, and the Sterling Tire Corporation of Rutherford, New Jersey, on the other, covering the terms and conditions under which certain automobile tires and tubes belonging to said Sterling

Tire Corporation, and now in the possession of the Receiver herein, may be sold.

And it further appearing that there is dispute as to the existence of any contract between said Sterling Tire Corporation and said alleged copartnership, and a dispute as to the right of any person to make any sale of the tires or tubes now in the possession of said Receiver without the consent and authority of said Sterling Tire Corporation; the said Sterling Tire Corporation appearing specially in this matter by their attorneys Howard Harron and McNair & Stoker, and participating herein for the purpose of this motion and order only;

And it further appearing that it is necessary for the Court to determine the existence, terms and conditions of such alleged contract, and that the presence of said Sterling Tire Corporation as a party to this action will aid the Court in said determination;

NOW, THEREFORE, IT IS HEREBY ORDERED that if said Sterling Tire Corporation enters its voluntary appearance herein on or before June 10, 1920, and on or before July 6, 1920, files its answer, complaint in intervention, or other pleading herein setting up its claim of title to the automobile tires and tubes above referred to, and its claim as to the existence or nonexistence of the contract set out as Exhibit "A" to plaintiff's complaint, then said Receiver shall hold all of said automobile tires and tubes intact to abide further

order of this Court; but in the event that said Sterling Tire Corporation does not, on or before June 10, 1920, enters its voluntary appearance herein, or, having entered its voluntary appearance herein on or prior to June 10, 1920, does not file its answer or other pleading herein on or before July 6, 1920, setting forth its claim as to the property now in said Receiver's hands, then said Receiver may at once apply to this Court for further direction as to the performance of his duties. [36]

It is further ordered that the Receiver may sell said tires and tubes or any of them, but only with the consent and upon such terms as may be approved by said Sterling Tire Corporation of Rutherford, New Jersey, or its authorized agents.

It is further ordered that the matter of fixing the fees of the Receiver and counsel fees be continued to the further order of this Court.

It is further ordered that the foregoing Order is conditioned upon the said Sterling Tire Corporation filing herein concurrently with its voluntary appearance a stipulation to the effect that the time covered by the pendency of this action shall not be computed as a part of the time referred to in those certain paragraphs of Exhibit "A" to plaintiff's complaint herein, reading as follows, to wit:

Party of the first part (Sterling Tire Corporation of Rutherford, New Jersey) agrees to consign for one hundred twenty (120) days approximately \$100,000.00 worth of tires and tubes, receipt of which is hereby acknowledged as per attached inventory.

IT IS FURTHER AGREED that the party of the first part shall reserve the right to cancel this contract on 30 days' notice if the party of the second part (Sterling Tire Company of California) fails during any three months period of this contract to order 25% of the total amount of contract.

Done in open Court, this twenty-eighth day of May, 1920.

E. P. SHORTALL,

Judge of said Superior Court.

O. K.—STOKER.

O. K.—R. A. BRONSON.

O. K.—HOWARD HARRON.

O. K.—EDGAR D. PEIXOTTO.

After said order of May 28, 1920, was made, and up to the date that the property replevined in this action was taken by the marshal, said Receiver retained possession of said property; but no business of the alleged copartnership was transacted during said period of time, by said Receiver, nor did he, during said period, sell any of said property or attempt to do so.

The following order was also made by said Court:
(Title of Court and Cause.)

Order Granting Permission to Sue Receiver.

Good cause appearing therefor, IT IS HEREBY ORDERED that the Sterling Tire Corporation of Rutherford, New Jersey, and the National Finance Company, a corporation, or either of them, may jointly or severally bring such action as either may desire, whether in replevin or otherwise, and in

either the courts of the State of California or of the United States, against John M. Sullivan, the Receiver herein, to determine the right of ownership or possession of any or all of the property seized and now possessed by said Receiver under the order of this Court appointing said Receiver.

Dated this 14th day of June, 1920, as of the 24th day of May, 1920.

E. P. SHORTALL,
Judge. [37]

Thereafter, and on the 2d day of March, 1920, the Court made the following order in said cause:

(Title of Court and Cause.)

Order Allowing Receiver's Compensation on Account.

The motion of John M. Sullivan, the receiver herein, for an order fixing, determining and securing a reasonable compensation for the receiver *pendente lite*, and on account, and for fixing, determining and securing a reasonable compensation to be paid the receiver as and for fees and services of his attorney, Edgad D. Peixotto, coming on regularly to be heard, said receiver being represented by his attorney, Edgar D. Peixotto and plaintiff being represented by his attorneys, Roy A. Bronson and F. J. Blake, and the defendant being represented by his attorney, Howard Harron, and evidence as to the services and work performed by said receiver and his attorney having been offered and heard by the Court and good cause appearing therefor.

IT IS HEREBY ORDERED that said John M. Sullivan, as receiver in the above entitled action be, and he is hereby awarded and allowed the sum of ONE THOUSAND (\$1000.00) DOLLARS on account of his services as such receiver, and that said John M. Sullivan be awarded and allowed the sum of FIFTEEN HUNDRED (\$1500.00) DOLLARS for and on account of attorney's fees incurred in said receivership.

That the Court now reserves its decision and order as to which party or fund said amounts are payable by or from, and to the fixing of the final and full compensation in the matter and as to rendering and settlement of the receiver's account.

Done in open court this 2d day of March, 1921.

E. P. SHORTALL,

Judge of the Superior Court.

On April 6, 1921, the Receiver served on the attorneys for Gerlinger and Hickok and filed with the clerk a report and account of his proceedings showing that there was due the Receiver a total sum of \$2,676.67, with a prayer that such account be approved and allowed.

On April 15, 1921, said Court made the following order confirming said account of the Receiver:

(Title of Court and Cause.)

Order Confirming Account of Receiver.

The motion of John M. Sullivan, the Receiver herein for an order approving and confirming the report and account of said Receiver, and for an order fixing and determining the fund, or party or

parties charged with the money due said Receiver, coming on regularly to be heard, said Receiver being represented by his attorney, Edgar D. Peixotto, and plaintiff being represented by his attorney, Roy A. Bronson, and the defendant being represented by his attorney, Howard Harron, and evidence having been introduced in the matter and the Court being fully advised and good cause appearing therefor,

IT IS HEREBY ORDERED that the report and account of said Receiver be, and the same is settled, allowed and confirmed.

IT IS FURTHER ORDERED that the moneys due said Receiver as shown by said account and report be, and the same are hereby made [38] payable and ordered to be paid out of the fund or property which came into the hands, possession and control of said Receiver under and by virtue of his appointment and authority as such Receiver, and that said Receiver have a lien on said fund or property for his compensation and fees, and that said Receiver be, and he is hereby authorized to take such other and further proceedings as may be necessary to take said amount out of said fund, together with any such further or additional amount as may hereafter be allowed by this Court, this Court reserving the right to make any further and final determination with reference to the further allowance to said Receiver.

Done in open court this 15th day of April, 1921.

E. P. SHORTALL,

Judge of the Superior Court.

On April 20, 1921, after the trial of said cause, the Court made its findings of fact and conclusions of law, as follows:

(Title of Court and Cause.)

Findings of Fact and Conclusions of Law.

THIS CAUSE having regularly come on for trial before the Court, a trial by jury having been expressly waived by stipulation of the respective parties appearing therein, on the 2d day of March, 1921, and at such time subsequent thereto to which said cause was duly and regularly continued, Roy Bronson, Esq., and Frank J. Blake, Esq., appearing for the plaintiff and Howard Harron, Esq., for the defendant, and after hearing the allegations and proofs, oral and documentary, of the parties, and the arguments of the respective counsel, and the Court, being fully advised in the premises, hereby makes and files the following findings of fact and conclusions of law, constituting my decision in said action.

FINDINGS OF FACT.

1. That the plaintiff and defendant did not, on or about the 16th day of April, 1920, or at any time at all, enter into an oral or any other agreement at all, wherein and whereby plaintiff and defendant agreed to and did, or agreed to or did, become copartners for the purpose of engaging in the automobile tire and tube business or for any other purpose whatsoever.

2. That plaintiff did not on or about said 16th day of April, 1920, or at any other time, or at all,

enter into his or any duties as copartners of defendant; and

3. That upon motion of plaintiff duly made in that behalf after commencement of this action, and on or about the seventeenth day of May, 1920, this Court appointed John M. Sullivan Receiver in the above-entitled action, and that thereupon and forthwith said John M. Sullivan entered into and upon his duties as such Receiver and entered into, assumed and took possession of the personal property and the whole thereof, described in the complaint of plaintiff herein and therein alleged to be the property and assets of said alleged copartnership; that thereafter and on the twelfth day of May, 1920, this Court, after a full hearing in which all parties to this action were represented, made an order modifying the order theretofore made appointing the Receiver, and directed and instructed said Receiver in his duties; that thereafter and on or about the twenty-eighth day of May, 1920, after a full hearing in which all parties to this action were represented and to which the Sterling Tire Corporation of Rutherford, New Jersey, appeared especially and was represented for the purpose of said hearing only, claiming an interest in the tires and tubes described in plaintiff's complaint herein, this Court made an order directing said Receiver in his duties, which said order is hereby referred to and made a part of these Findings of Fact. [39]

As conclusions of law from the foregoing facts, the courts finds:

CONCLUSION OF LAW.

That defendant is entitled to judgment for his costs herein. Let judgment be entered accordingly.

Dated: April 20th, 1921.

E. P. SHORTALL,
Judge.

On April 20, 1921, the following judgment on said findings was entered:

(Title of Court and Cause.)

Judgment on Findings.

This case came on regularly for trial, Messrs. Roy Bronson, Frank J. Blake appearing as counsel for plaintiff, and Howard Harron, Esq., for defendant. A trial by jury having been expressly waived by counsel for respective parties, the cause was tried before the Court sitting without a jury. Whereupon witnesses on the part of plaintiff and defendant were duly sworn and examined; and certain evidence both oral and documentary was introduced, the evidence being closed, the cause was submitted to the Court for consideration and decision, and after due deliberation thereon the Court delivers its findings and decision in writing, which is filed, and orders that judgment be entered in accordance therewith.

WHEREFORE, by reason of the law and the findings aforesaid, It is ORDERED, ADJUDGED AND DECREED that E. E. Gerlinger, plaintiff do take nothing by this said action as against G. R. Hickok, defendant, but that judgment be and the

same is hereby entered herein in favor of said defendant and against said plaintiff for said defendant's costs and disbursements incurred in this action, amounting to the sum of \$——.

Judgment entered April 20th, 1921.

Book 104, page 348, 4:40 P. M.

The cause was submitted to the Court for decision upon the pleadings and the foregoing facts.

Plaintiff requested the Court for judgment for the recovery of the possession of the property, free of any charge against it on behalf of the defendant, and for damages for its detention from May 10, 1920, to June 16, 1920, equivalent to legal interest for that period of time on the agreed value of the property.

Defendant requested the Court for judgment ordering plaintiff to conditionally return the property to the defendant for the purpose of closing the receivership.

Thereupon the Court ordered judgment in favor of the plaintiff for the return of the property, or its value, subject to the demand established by the State Court against the property in favor of the Receiver, but without damages for its detention. To which order and judgment plaintiff excepted at the time. [40]

In the Southern Division of the District Court of
the United States, in and for the Northern
District of California, Second Division.

No. 16,392.

STERLING TIRE CORPORATION,
Plaintiff,

vs.

JOHN M. SULLIVAN, as Receiver of an Alleged
Copartnership Consisting of E. E. GER-
LINGER and G. R. HICKOK and Trading
Under the Fictitious Name of STERLING
TIRE COMPANY OF CALIFORNIA,
Defendant.

E. E. GERLINGER,
Intervenor.

Stipulation Re Bill of Exceptions.

It is hereby stipulated and agreed the foregoing
bill of exceptions is correct, and that the same may
be signed, settled and allowed by the Court.

Dated: October 17, 1921.

McNAIR & STOKER,
Attorneys for Plaintiff.
EDGAR D. PEIXOTTO,
Attorney for Defendant.
ROY A. BRONSON,
Attorney for Intervenor. [41]

In the Southern Division of the District Court of
the United States, in and for the Northern
District of California, Second Division.

No. 16,392.

STERLING TIRE CORPORATION,

Plaintiff,

vs.

JOHN M. SULLIVAN, as Receiver of an Alleged
Copartnership Consisting of E. E. GER-
LINGER and G. R. HICKOK and Trading
Under the Fictitious Name of STERLING
TIRE COMPANY OF CALIFORNIA,

Defendant.

E. E. GERLINGER,

Intervenor.

Order Settling Bill of Exceptions.

This bill of exceptions having been duly pre-
sented to the Court within the time allowed by law
and the rules of Court is now signed, settled and
allowed as correct, and the same is hereby ordered
to be filed by the clerk of this Court as a part of the
records in this cause.

Dated: October 19th, 1921.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Oct. 20, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [42]

(Title of Court and Cause.)

Petition for Writ of Error.

The above-named plaintiff, Sterling Tire Corporation, feeling itself aggrieved by the judgment of the above-entitled court entered against it in this cause, comes now by its attorneys and petitions this Court for an order allowing it to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, under and in accordance with the laws of the United States in that behalf made and provided, and that an order be made fixing the amount of security which plaintiff shall give upon said writ of error.

WHEREFORE plaintiff prays that said writ of error be granted and the amount of said security be fixed.

McNAIR & STOKER,
Attorneys for Plaintiff.

Receipt of a copy of the within petition for writ of error hereby acknowledged this 20th day of October, 1921.

EDGAR D. PEIXOTTO,
Attorney for Defendant.
ROY A. BRONSON,
Attorney for Intervenor.

[Endorsed]: Filed Oct. 20, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [43]

(Title of Court and Cause.)

Assignment of Errors.

Comes now the plaintiff above named, Sterling Tire Corporation, and files the following assignment of errors upon which it will rely on the prosecution of its writ of error in the above-entitled cause.

I.

That the said Court, in rendering judgment in favor of plaintiff and against defendant for the return of the property replevined, or its value, erred in adjudging that the return of said property, or its value, should be subject to the demand established by the State Court against said property in favor of said defendant.

II.

That the said Court, in rendering judgment in favor of plaintiff and against defendant for the return of the property replevined, or its value, erred in refusing to adjudge that said property, or its value, should be returned to plaintiff free of any charge against it in favor of said defendant.

III.

That the said Court, in rendering judgment in favor of plaintiff and against defendant for the return of the property replevined, or its value, erred in refusing to adjudge that plaintiff was entitled to damages against defendant for the detention of said property from May 10, 1920, to June 16, 1920, equivalent to legal interest for that period

of time on the agreed value, to wit, \$100,000, of said property.

IV.

That the said Court, in rendering judgment in favor of plaintiff and against defendant for the return of the property [44] replevined, or its value, erred in adjudging that plaintiff was not entitled to damages against defendant for the detention of said property from May 10, 1920, to June 16, 1920, equivalent to legal interest for that period of time on the agreed value, to wit, \$100,000 of said property.

WHEREFORE, said plaintiff, plaintiff in error, prays that said judgment of the said Court be reversed, and that said Court be directed to render judgment in favor of plaintiff and against defendant for the return of the property replevined, or its value, free of any charge against said property on behalf of said defendant, and for damages for the detention of said property from May 10, 1920, to June 16, 1920, equivalent to legal interest for that period of time on the agreed value of said property, to wit, \$100,000.

McNAIR & STOKER,

Attorneys for Plaintiff.

Receipt of a copy of the within assignment of errors hereby acknowledged this 20th day of October, 1921.

EDGAR D. PEIXOTTO,

Attorney for Defendant.

ROY A. BRONSON,

Attorney for Intervenor.

[Endorsed]: Filed Oct. 20, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [45]

(Title of Court and Cause.)

Order Allowing Writ of Error.

The plaintiff above named, having filed its petition for a writ of error, together with an assignment of errors, and praying that an order be made fixing the amount of security which plaintiff shall furnish on said writ of error:

It is ORDERED that a writ of error be, and hereby is, allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore entered herein; and that the amount of bond on said writ of error be, and hereby is, fixed at \$500.00.

Dated: October 20th, 1921.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Oct. 20, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [46]

(Title of Court and Cause.)

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, That we, Sterling Tire Corporation, as principal, and Fidelity & Deposit Company of Maryland, a Corporation, as surety, are held and firmly bound

unto John M. Sullivan, as Receiver of an alleged copartnership consisting of E. E. Gerlinger and G. R. Hickok and trading under the fictitious name of Sterling Tire Company of California, and E. E. Gerlinger, in the sum of Five Hundred (\$500) Dollars, to be paid to the said John M. Sullivan, as such Receiver, and the said E. E. Gerlinger, their executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our successors, representatives and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 20th day of October, 1921.

WHEREAS, lately at a District Court of the United States for the Northern District of California in a suit depending in said Court, between Sterling Tire Corporation, plaintiff, and John M. Sullivan, as Receiver of an alleged copartnership consisting of E. E. Gerlinger and G. R. Hickok and trading under the fictitious name of Sterling Tire Company of California, defendant, and E. E. Gerlinger, intervenor, a judgment was rendered against the said Sterling Tire Corporation, and the said Sterling Tire Corporation having obtained from said Court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said John M. Sullivan, as Receiver of an alleged copartnership consisting of E. E. Gerlinger and G. R. Hickok [47] and trading under the fictitious name of Sterling Tire Company of California, and the said E. E. Gerlinger citing and admonishing them to be and appear at a

United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, within thirty days from the date of said citation:

Now, the condition of the above obligation is such, that if the said Sterling Tire Corporation shall prosecute its said writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

STERLING TIRE CORPORATION.

FIDELITY AND DEPOSIT CO. OF MD.

(Seal)

By H. J. CRIDER,
Attorney-in-fact.

M. F. CARLETON,
Agent.

The premium charged for this bond is Ten Dollars per annum.

The above bond approved.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Oct. 20, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [48]

(Title of Court and Cause.)

Praeipie for Record on Writ of Error.

To the Clerk of Said Court:

Sir: Please prepare transcript of record upon writ of error in the above-entitled cause, and include the following:

1. Complaint.
2. Affidavit of replevin, instructions attached thereto, and return of marshal thereon.
3. Replevin bond in the sum of \$200,000.
4. Answer to complaint.
5. Order allowing intervention dated September 10, 1920.
6. Complaint in intervention.
7. Plaintiff's answer to complaint in intervention.
8. Stipulation waiving jury.
9. Bill of exceptions, with stipulation thereto, and order settling same.
10. Judgment.
11. Petition for writ of error.
12. Assignment of errors.
13. Order allowing writ of error.
14. Bond on writ of error.
15. Writ of error.
16. Citation.

McNAIR & STOKER,
Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 20, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [49]

In the Southern Division of the United States
District Court, in and for the Northern District
of California, Second Division.

No. 16,392.

STERLING TIRE CORPORATION,

Plaintiff,

vs.

JOHN M. SULLIVAN, as Receiver, etc.,

Defendant.

**Certificate of Clerk U. S. District Court to Trans-
script of Record on Writ of Error.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing forty-nine (49) pages, numbered from 1 to 49, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for record on writ of error, as the same remain on file and of record in the above-entitled cause, in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$23.60; that said amount was paid by the plaintiff, and that the original writ of error and citation issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 31st day of October, A. D. 1921.

[Seal] WALTER B. MALING,
Clerk United States District Court in and for the
Northern District of California. [50]

Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, GREETING:

BECAUSE, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Sterling Tire Corporation, plaintiff in error, and John M. Sullivan, as Receiver of an alleged co-partnership consisting of E. E. Gerlinger and G. R. Hickok and trading under the fictitious name of Sterling Tire Company of California, defendant in error, and E. E. Gerlinger, intervenor, defendant in error, a manifest error hath happened, to the great damage of the said Sterling Tire Corporation, plaintiff in error, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send

the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM H. TAFT, Chief Justice of the United States, the 20th day of October, in the year of our Lord one thousand nine hundred and twenty-one.

[Seal]

WALTER B. MALING,
Clerk of the United States District Court, Northern
District of California.

By J. A. Schaertzer,
Deputy Clerk.

Allowed by

WM. C. VAN FLEET,
U. S. Dist. Judge. [51]

Receipt of a copy of the within writ of error hereby acknowledged this 20th day of October, 1921.

EDGAR D. PEIXOTTO,
Attorney for Defendant in Error.

ROY A. BRONSON,
Attorney for Intervenor.

[Endorsed]: No. 16,392. United States District Court for the Northern District of California. Sterling Tire Corporation, Plaintiff in Error, vs. John M. Sullivan, etc., Defendant in Error. Writ of Error. Filed Oct. 20, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Return to Writ of Error.

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal]

WALTER B. MALING,
Clerk United States District Court for the Northern
District of California. [52]

In the Southern Division of the District Court of the United States, in and for the Northern District of California, Second Division.

No. 16,392.

STERLING TIRE CORPORATION,

Plaintiff in Error,

vs.

JOHN M. SULLIVAN, as Receiver of an Alleged Copartnership Consisting of E. E. GERLINGER and G. R. HICKOK and Trading Under the Fictitious Name of STERLING TIRE COMPANY OF CALIFORNIA,

Defendant in Error.

E. E. GERLINGER, Intervenor.

Citation on Writ of Error.

The President of the United States to John M. Sullivan, as Receiver of an Alleged Copartnership Consisting of E. E. Gerlinger and G. R. Hickok and Trading Under the Fictitious Name of Sterling Tire Company of California, and to Edgar D. Peixiotto, Your Attorney, and to E. E. Gerlinger and to Roy A. Bronson, Your Attorney:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the above-entitled court, wherein

the Sterling Tire Corporation is plaintiff in error and you, and each of you, are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WM. C. VAN FLEET, District Judge of the United States District Court, in and for the Southern Division of the Northern District of California, this 20th day of October, 1921.

WM. C. VAN FLEET,
Judge. [53]

Receipt of a copy of the within citation hereby acknowledged this 20th day of October, 1921.

EDGAR D. PEIXOTTO,
Attorney for Defendant.

ROY A. BRONSON,
Attorney for Intervenor.

[Endorsed]: No. 16,392. Southern Division, District Court of the U. S., Northern District of Cal., Second Division. Sterling Tire Corporation, Plaintiff, vs. John M. Sullivan, as Receiver, etc., Defendant. E. E. Gerlinger, Intervenor. Citation. Filed Oct. 20, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 3794. United States Circuit Court of Appeals for the Ninth Circuit. Sterling Tire Corporation, a Corporation, Plaintiff in Error, vs. John M. Sullivan, as Receiver of an Alleged

Copartnership Consisting of E. E. Gerlinger and G. R. Hickok and Trading Under the Fictitious Name of Sterling Tire Company of California, and E. E. Gerlinger, Intervenor, Defendants in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed October 31, 1921.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

No. 3794

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

STERLING TIRE CORPORATION (a corporation),
Plaintiff in Error,

VS.

JOHN M. SULLIVAN, as Receiver of an alleged
co-partnership consisting of E. E. GER-
LINGER and G. R. HICKOK and trading under
the fictitious name of STERLING TIRE COM-
PANY OF CALIFORNIA, and E. E GERLINGER,
Intervenor,

Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

McNAIR & STOKER,
Attorneys for Plaintiff in Error.

FILED

JAN 20 1922

F. D. MCKINTON,

No. 3794

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

STERLING TIRE CORPORATION (a corporation),
Plaintiff in Error,

VS.

JOHN M. SULLIVAN, as Receiver of an alleged
co-partnership consisting of E. E. GER-
LINGER and G. R. HICKOK and trading under
the fictitious name of STERLING TIRE COM-
PANY OF CALIFORNIA, and E. E GERLINGER,
Intervenor,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

This is an action in replevin brought by plaintiff in error to recover the possession of certain automobile tires and tubes seized by defendant in error Sullivan while acting as receiver under appointment by the Superior Court of the State of California, in and for the City and County of San Francisco.

An action was commenced in said Superior Court by the above named intervenor, E. E. Gerlinger, against one G. R. Hickok, claiming that Gerlinger and Hickok were partners trading under the fictitious name of Sterling Tire Company of California; that Hickok had refused to recognize Gerlinger as a partner; that the partnership assets consisted of a contract between said partnership and the Sterling Tire Corporation, plaintiff in error herein, under which the partnership had the right to sell automobile tires and tubes manufactured by plaintiff in error. In his said action Gerlinger asked for a dissolution of the alleged copartnership, for an accounting, and for the appointment of a receiver to take possession of the partnership assets and to conduct the partnership business.

The State Court appointed defendant in error Sullivan receiver for the alleged copartnership as prayed in said complaint. The order appointing the receiver was made *ex parte*. The receiver immediately seized the property involved in this action, consisting of automobile tires and tubes of the value of \$100,000, as being assets of the alleged copartnership.

About one month thereafter plaintiff in error commenced the present action in replevin and took all of said property from the possession of the receiver, first obtaining from the Court appointing the receiver an order permitting such replevin action to be brought.

At the time the receiver seized the property involved it was in San Francisco in possession of plaintiff in error's agent, under the following circumstances: Previous to April, 1920, the property had been delivered by plaintiff in error to one Warren of San Francisco for sale. Differences arose between Warren and plaintiff in error, and in April, 1920, plaintiff in error sent its second vice-president, E. R. Northrop, to San Francisco to terminate the existing arrangements and procure another representative. Northrop made an adjustment with Warren, accepted from Warren the return of the property, being the automobile tires and tubes replevined in this action, and placed the property with a custodian pending the selection of a new representative for the Pacific Coast to handle plaintiff in error's line of goods. In seeking a new representative Northrop met E. E. Gerlinger, and offered the agency to him; but the proposition was too big for Gerlinger's resources. Gerlinger introduced Northrop to G. R. Hickok. Negotiations between Northrop, Hickok and Gerlinger resulted in the formulation of a contract which provided, in effect, for the consignment of these and other tires and tubes by plaintiff in error to the Sterling Tire Company of California, for sale on stated terms and conditions. This contract was signed by Hickok on behalf of the Sterling Tire Company of California, and Northrop immediately forwarded it to plaintiff in error at its office in New Jersey, for approval.

The proposed contract was not accepted by plaintiff in error, and no contract was ever entered into between it and the Sterling Tire Company of California. It was while the proposed contract was in New Jersey under consideration by plaintiff in error that Gerlinger brought his suit and procured the appointment of defendant in error Sullivan as receiver, and the receiver seized the property while plaintiff in error had the proposed contract under consideration.

Hickok answered Gerlinger's complaint, denying any copartnership relation, and alleged that the Sterling Tire Company of California was the fictitious name of the National Finance Company, a corporation in which he (Hickok) was interested; and further alleged that the Sterling Tire Company of California merely held possession of the tires and tubes as custodian for plaintiff in error, and that no contract of any kind was consummated between plaintiff in error and the Sterling Tire Company of California.

Plaintiff in error was not made a party to said action in the State Court, never asked leave to become a party, and never became a party; but on May 18, 1920, approximately one week after the receiver had seized plaintiff in error's property, Mr. Howard Harron, attorney for Hickok, advised the State Court that he had been authorized to act for plaintiff in error, and requested said Court to require the plaintiff in that action to give a bond

that would indemnify plaintiff in error as well as the defendant Hickok. This request was opposed by the attorney for Gerlinger. The State Court acceded to Mr. Harron's request, and thereupon a bond in the sum of \$5000 was given by Gerlinger to indemnify not only the defendant Hickok but plaintiff in error as well against such damages as they might sustain by reason of the appointment of the receiver if his appointment was wrongfully procured.

Afterwards, and on May 24, 1920, the receiver served a notice on the respective attorneys for Gerlinger and Hickok, but not on the plaintiff in error, that on May 27th he would move the State Court for an order directing his course and conduct of carrying on the business of the alleged copartnership. When said motion came on for hearing on May 27th, George E. Stoker appeared specially and advised the Court that he had just been retained as counsel for plaintiff in error, and requested that no order be made respecting the sale or disposition of these tires seized by the receiver until he could communicate with plaintiff in error and ascertain the facts of the case and the wishes of his client, stating to the Court that a sale of the property by the receiver might be prejudicial to the business and standing of plaintiff in error. Thereupon an order was agreed upon, appearing at pages 40-43 of the Transcript, the purpose and effect of which was to give plaintiff in error until

June 10, 1920, to determine what course it should pursue. Plaintiff in error concluded to avail itself of the remedy of replevin, and to this end to invoke the jurisdiction of the United States District Court. This action was commenced on June 11, 1920. Plaintiff in error gave a replevin bond in the penal sum of \$200,000, in favor of E. E. Gerlinger as well as the receiver. The property was taken by the marshal and subsequently delivered by him to plaintiff in error, who now has it. Subsequently, and on April 15, 1921, without any notice to plaintiff in error of its intention in that regard, on motion of the receiver, the State Court made an order settling the receiver's account in the sum of \$2,676.67, and ordering that said sum be made payable "out of the fund or property which came into the hands, possession and control of said receiver under and by virtue of his appointment and authority as such receiver, and that said receiver have a lien on said fund or property for his compensation and fees" (Tr. p. 46).

Within one week after making the foregoing order the State Court gave its judgment, in the case of Gerlinger against Hickok, in favor of the defendant therein, expressly finding that no partnership was entered into between said parties as alleged in Gerlinger's complaint, or at all.

The result of the judgment of the State Court in the case of *Gerlinger v. Hickok* left little for determination in the replevin action in the Court below.

The finding of the State Court that no partnership existed between Gerlinger and Hickok, contrary to the allegations of Gerlinger's complaint, was equivalent to a finding that the appointment of the receiver was wrongful and that the seizure by the receiver of the property replevined was wrongful. The evidence offered at the trial of the replevin action proved, and the fact appears by the bill of exceptions, that at the time of the commencement of the replevin action plaintiff in error was the owner and entitled to the possession of the property replevined. Under these circumstances plaintiff in error requested the trial Court to give judgment in its favor for the recovery of possession of the property, free of any charge against it on behalf of the receiver, and for damages for its detention from May 10, 1920, to June 16, 1920, equivalent to legal interest for that period of time on the agreed value of the property, to wit, \$100,000 (Tr. p. 50).

The trial Court granted this request in part only. It ordered judgment in favor of plaintiff in error for the return of the property, but subject to the payment by plaintiff in error of the sum of \$2,676.67 adjudged a lien thereon by the State Court in favor of the receiver, and without damages for its detention, and without costs (Tr. pp. 28-29, 50).

The theory upon which the trial Court gave its judgment was that plaintiff in error submitted its property to the jurisdiction of the State Court and to the rights of the receiver (1) by asking and re-

ceiving at the hands of that Court a bond for indemnity against damages it might sustain by reason of the acts of the receiver if the receiver's appointment was wrongful (Tr. pp. 36-37), and (2) by participating in the proceedings in the State Court resulting in the order of that Court dated May 28, 1920 (Tr. pp. 40-43), to the extent disclosed by said order. The trial Court said:

“Of course, had you simply ignored the Superior Court, which you had the right, as a non-resident, to do, and had come into this Court and sued out your action in replevin, your case would have been entirely free. * * * The recognition was by going in and participating. You were not called on to do that. If you saw fit to seek the jurisdiction of another tribunal, you had a right to come in here and bring an action for replevin and take your property, and not have gone into that Court at all. Of course, you did not subject yourself to the general jurisdiction of that Court. * * * I do not see how I can avoid the results of what occurred in the State Court. * * * All I am holding is that upon the case as presented here by the mutual statements of counsel, and as to which there seems to be no question in the main, that while you are entitled to judgment here, you will take it subject to the requirement to pay this demand that is shown to have been allowed by the State Court as against the property. * * * That, of course, I have no jurisdiction to revise. I cannot inquire into the value of the receiver's services, or the services of his attorney. * * * You are entitled to the return of the property, or its value, because it is determined that the title and right of possession were in you. As

the action is against the mere arm of a Court of sister jurisdiction, you are not entitled to anything in the nature of damages for the detention."

Assignment of Errors.

Plaintiff in error complains of and assigns as error:

First. The ruling of the trial Court that judgment should be entered in favor of plaintiff in error for the return of the property replevined, or its value, subject to the lien attempted to be established against the property by the order of the State Court of April 15, 1921, notwithstanding plaintiff in error's request that judgment be ordered in its favor for the recovery of the property free and clear of any charge against it on behalf of the receiver.

Second. The ruling of the trial Court that judgment should be entered in favor of plaintiff in error for the return of the property replevined, or its value, but without damages for its detention, and without costs, notwithstanding plaintiff in error's request that the judgment include damages for the detention from May 10, 1920, to June 16, 1920, equivalent to legal interest for that period of time on the agreed value (\$100,000) of the property.

Argument.

I.

The first error assigned involves the effect of the order of the State Court of April 15, 1921 (Tr. pp.

45-46), attempting to charge a lien against the property replevined for the payment of the expenses of the receivership, and the extent to which that order was controlling on the Court below in the determination of the replevin action.

On May 24, 1920, the State Court made an order permitting this action to be brought against the receiver and the property to be taken from the receiver's possession (Tr. pp. 43-44). This action was brought on June 11, 1920, and the property taken from the receiver on June 16, 1920, and delivered to plaintiff in error, who now has it. Ten months thereafter, and while the replevin action was still pending, and without plaintiff in error having an opportunity to be heard, the State Court made its order of April 15, 1921. The Court below was of the opinion that it was bound by that order, and that, notwithstanding the evidence showed without contradiction that plaintiff in error was entitled to the possession of the property on the date the replevin action was commenced, any judgment in favor of plaintiff in error for the return of the property, or its value, would have to be subject to said order of the State Court.

DUE PROCESS NECESSARY TO SUSTAIN A JUDGMENT.

That the owner cannot be divested of his property, or of his right to retain its possession, except by an order made in a proceeding to which he was a party

and in which he had been given an opportunity to be heard, is unquestioned and unquestionable. To take it in any other manner would be to deprive the owner of his property without due process of law, contrary to section 13 of article I of the Constitution of California and contrary to article V and section 1 of article XIV of the Constitution of the United States.

Upon the same principle no Court has the power to direct its receiver to seize property of a person not a party to the record; and if the receiver assumes to take property of a stranger to the record he will be a trespasser.

34 Cyc. 190, 410.

To the extent that the receiver's seizure embraces property of a stranger to the record an exception is created to the general rule that the court's jurisdiction of the *res* is acquired by a seizure. Jurisdiction cannot be obtained except by a lawful seizure.

15 C. J. 802, note 97.

And even where jurisdiction is acquired of the *res* by a lawful seizure, in proceedings *quasi in rem* it is imperative that citation, actual or constructive, be made upon the owner in order for the Court to lawfully exercise the jurisdiction so acquired.

Freeman v. Alderson, 119 U. S. 185; 30 L. Ed. 372.

The property here involved, and which the receiver seized in the State Court action of *Gerlinger*

v. Hickok, was not the property of either of the parties to that action, nor was either of said parties at said time in the possession of said property or entitled to its possession. It was seized by the receiver upon the theory, and under an order consonant with such theory, that it was then in the possession of a co-partnership, composed of Gerlinger and Hickok, and known as the Sterling Tire Company of California, and that such co-partnership was entitled to its possession. The State Court, in the action referred to, ultimately found that no such co-partnership existed. These facts are conceded.

The conclusion is inescapable that when the receiver seized the property he was a trespasser. He took property not in the possession of or belonging to the persons over whose estate he was appointed. Indeed, he was not receiver of the estate of anybody. The partnership for which he was appointed was wholly imaginary.

The property seized by the receiver belonged to plaintiff in error and at that time was in the possession of plaintiff in error's agent. Plaintiff in error was not a party to the action in which the receiver was appointed, and no attempt was made to make it a party. These facts will not be disputed.

The State Court made an order assessing the expenses of the receivership against the property of plaintiff in error. Plaintiff in error was not heard and was given no opportunity to be heard when this order was made. These facts, also, will be conceded.

Upon such a state of facts, unaffected by other considerations, we believe all will agree that the order of the State Court would be absolutely void and subject to collateral attack.

ATTEMPTED JUSTIFICATION OF ORDER OF APRIL 15, 1921.

The receiver attempts to avoid these consequences by the argument that plaintiff in error "recognized" him and "recognized" his possession by certain acts of participation in the State Court proceedings.

These so-called acts of participation were (1) a request of the State Court by plaintiff in error that Gerlinger, plaintiff in the State Court case, be required to give a bond to indemnify plaintiff in error against damages that it might sustain by reason of the receiver's acts if he were wrongfully appointed, in pursuance of which request such a bond was furnished (Tr. pp. 36-37), and (2) a special appearance at the hearing of the receiver's motion for an order directing him in his duties, and approval of the order made by the State Court in response to said motion (Tr. pp. 38-43).

The theory upon which the trial Court gave its judgment, here sought to be reviewed, was that inasmuch as plaintiff in error "recognized" the receiver and his possession, in the fashion indicated, the State Court acquired the right, which otherwise it did not possess, to charge the expenses of the re-

ceivership against plaintiff in error's property, as it attempted to do by its order of April 15, 1921, and that the Court below could not revise that order, but was bound by it.

Plaintiff in error maintains that the contentions of the receiver are unsound and the conclusions of the trial Court are erroneous, for the following reasons:

First. It was impossible for plaintiff in error, not being a party to the State Court proceedings and the receivership not being for its benefit or the benefit of its property, to so recognize the receiver or his possession as to give the State Court the right to charge the expenses of the receivership against that property. Nothing short of plaintiff in error's express consent to the making of an order of that kind could justify the making of such an order under these circumstances.

Second. Plaintiff in error, by its participation in the State Court proceedings, challenged the receiver's possession instead of recognizing his possession as rightful.

Third. If such participation was a recognition of the rightfulness of the receiver's possession, plaintiff in error was entitled to an opportunity to be heard before any valid order could be made imposing burdens upon its property; and since the order of the State Court of April 15, 1921, was void because made without notice, it was subject to collateral attack in the replevin action, even if the

State Court had the power, otherwise, to make such order.

Fourth. Since the State Court granted permission for the property to be taken from the receiver's possession in a replevin action in another tribunal, after the property was so taken the State Court was divested of all power to make any order affecting the property except upon condition of it being subsequently returned to the receiver pursuant to a judgment in the receiver's favor in the replevin suit.

Let us consider these contentions in their order.

**RULE OF ESTOPPEL NOT APPLICABLE TO
PLAINTIFF IN ERROR.**

We concede that a *defendant* in an action, by various acts of participation therein, or even through failure to act in some particular fashion, will be estopped from afterwards objecting to the receiver's appointment. Cases illustrative of this rule may be found in *34 Cyc.*, page 162.

But this rule has no application to a *stranger* to the record, who has no interest in the controversy and against whom no relief is sought, whose property has been wrongfully taken and to whom the receivership can be of not benefit. No authority can be cited wherein it has been held that the rule of estoppel is applicable to him. As is said by the Supreme Court of Illinois, in the case of *Higley v. Deane*, 168 Ill. 272; 48 N. E. 52:

“And the courts almost uniformly hold in the case of intervenors that, where the receivership is not requested by them, and they obtain no benefit from it, they or their property are not liable for any of the costs or expenses.”

A receivership is a provisional remedy, a collateral proceeding adapted to meet a particular exigency in connection with a regular action. The proceedings imply the existence of a right which one party is entitled to have enforced against another, and the purpose is to conserve the property until the rights of the respective parties have been adjudicated. The principles of law governing receiverships, and the applicability of the rule of estoppel, are based upon such a relationship of parties. There can be no such application to a stranger, against whom no relief is sought.

The contention of the receiver is that plaintiff in error, by participating in the proceedings in the State Court in the manner disclosed, invoked against itself this rule of estoppel, and to the extent of depriving it of the right to object to having its property charged with the expenses of the receivership. Analyze the receiver's contention in whatever manner we may, the result is, if the contention is correct, that plaintiff in error thereby consented that the expenses might be charged against its property. This is the inescapable result, because it must be conceded that the Court could lawfully charge the expenses to the property only if the receiver were rightfully in possession, and if plaintiff in error by

its participation recognized the rightfulness of the receiver's possession it could not afterwards be heard to say that the Court did not have the right to impose this burden upon the property. This, we submit, is carrying the doctrine of estoppel to an unheard of and unwarranted extent.

When it becomes thus obvious that a recognition of the rightfulness of the receiver's possession implies consent to charging the expenses of the receivership to the property, the absurdity of attributing recognition of the receiver's rightful possession to plaintiff in error's acts of participation is apparent. Consequences of this character might attach to a *party defendant* who thus participated, but we challenge defendants in error to cite any authority holding that a stranger to the record may be so penalized. Plaintiff in error was not a party to those proceedings. It could not benefit by the receivership. It could not recognize the rightfulness of the receiver's possession without admitting to be fact what as to it nobody alleged to be fact, namely, the existence of the co-partnership between Gerlinger and Hickok and such co-partnership's right to possession of the property. Plaintiff in error, not being a party to the action, had no issue tendered to it on those matters. Therefore it was not committed as to any such matter by its participation in the proceedings. It is our contention that plaintiff in error could participate in the proceedings in the State Court to any extent it pleased, so far as that

Court permitted, without the impairment of any of its rights, so long as it was not made a party and no relief was asked as against it; and this being true it cannot be held to have admitted that the receiver was rightfully in possession when in truth he was not rightfully in possession, and when his possession could not be made rightful.

We beg to quote somewhat at length from the case of *Tome v. King*, 64 Md. 166, in support of the argument that a stranger to a proceeding in which a receiver was appointed, who had no opportunity to be heard when the receiver was appointed and placed in charge, and who was not benefited by the receivership, even though he actively participated in the proceedings subsequent to the receiver's appointment, cannot be held to have so recognized the receivership as to justify an order assessing the expenses of the receivership against him or his property. While the facts of that case are not in all respects similar to the facts of the case at bar, yet we submit that the principles of equity and rules of law are applicable to the one case as pertinently as to the other. In the case at bar the recognition of the receiver by plaintiff in error was not as positive as by the trustee of the first mortgage bondholders in *Tome v. King*. That was a case to foreclose a second mortgage, and receivers were appointed. The first mortgagee was not made a defendant. Later, the trustee under the first mortgage intervened and participated in the proceedings. He even

requested the Court to ratify a sale of the property made by the receivers. This sale, however, the Court refused to approve. Subsequently the property was sold subject to the first mortgage. The amount realized was not sufficient to pay the expenses of the receivership, and the trial Court made an order attempting to collect the deficiency from the bondholders under the first mortgage. Said order provided that in the event of the failure of the first mortgage bondholders to pay this deficiency the trustee should "make sale, at public auction, of the said first mortgage bonded debt and security" for such purpose. In reversing this order the Supreme Court of Maryland said:

"It is contended by the appellees that Tome, as the representative of the first mortgage bondholders, was a party to the proceedings, and that, therefore, the fund represented by him was not only liable to be decreed upon, but was liable for the commissions and disbursements that were allowed to the receivers and trustees. Whether this be so or not depends upon circumstances. It is certainly true, as a general rule, as contended by the appellees, that where a subsequent mortgagee or other incumbrancer files a bill for the purpose of ascertaining the extent of priorities, making a prior mortgagee a party, but without offering to redeem, the prior mortgagee may insist upon being dismissed with costs. But if such prior mortgagee or incumbrancer, instead of asking to be dismissed, consents to a sale and to take his principal and interest out of the proceeds, as he thereby adopts the suit and takes the benefit of it, he must contribute, in the event of a deficiency of the fund, to the costs of the suit and

expenses of the sale; and therefore such costs and expenses will be paid out of the fund, even though there may not be enough left to pay the prior incumbrancer his principal and interest. *White v. Bishop of Peterborough*, Jac. 402; 3 Dan'l Ch. Pr. 1530. But that is not this case. Here, as we have seen, the original bill was filed by the trustees in the second mortgage without making the first mortgagees or any of them parties. It was at the instance of the second mortgagees that the property was placed in the hands of receivers, and by so doing the right and power of the trustee in the first mortgage to take possession and operate the road, 'as authorized by that deed, was defeated; and as that was the effect of placing receivers on the property, the trustee in the first mortgage should have been made a party to the bill filed by the trustees for the second mortgage bondholders. *Miltenberger v. R. R. Co.*, 106 U. S. 286, 306. But that was not done; and the receivers were appointed, and they took possession of the entire property, for the benefit of the second mortgage bondholders, without an opportunity on the part of the trustee for the first mortgage bondholders to be heard. It was not until some time after the receiver had taken possession of the property, and some portion of it had been sold, that Tome, as trustee, intervened by petition, and upon being admitted as a party defendant, filed his cross-bill, in which he prayed for a sale. In two of the efforts made to sell the property under interlocutory orders, he joined, but those efforts wholly failed. In the final decree for sale, the property was decreed to be sold subject to the first mortgage, and therefore the first mortgage bondholders were in no manner affected in their rights by that sale. The sale having been made subject to the first mortgage, in no event could the first mortgage bondholders participate in the dis-

tribution of the proceeds of that sale, even though such proceeds had greatly exceeded the second mortgage debt,—the sale only operating upon the equity of redemption covered by the second mortgage. *Woodworth v. Blair*, 112 U. S. 8.

“Seeing then that the receivers were appointed solely at the instance and for the benefit of the second mortgage bondholders, and that the trustees who sold the property were appointed to sell exclusively for the benefit of the same parties, and not for the benefit of the first mortgage bondholders, upon what principle is it that the first mortgage bondholders should be made to pay the commissions and expenses allowed, or any part of them, to such receivers and trustees? We must confess we are at a loss to understand how it can be done, upon any principle of justice or reason. None of the first mortgage debt has been realized by sale, and that incumbrance remains intact. It is said, however, that the property was purchased at the sale for the benefit of the holders of the first mortgage bonds, and that therefore they were benefited by the sale. But we do not perceive how that fact, supposing it to be true, can justify the charging those bondholders with the commissions and other expenses in question. The objects in filing the original bill were to have receivers appointed, and a sale of the property decreed, and that, too, without the consent or co-operation of the trustee of the first mortgage bondholders, and both objects of the suit were gratified strictly in conformity to the prayer of the bill. The property having been sold for the benefit of the second mortgage bondholders, it was a right of the first mortgage bondholders, or any one or more of them, to purchase in the equity of redemption, or if it had been sold to a stranger, they could have

purchased it from him as well; and by such purchase they rendered themselves liable for nothing more than the purchase money—certainly not for commissions and expenses to the receivers and trustees on an amount that still remains a charge upon the property, and subject to which they made the purchase. There is therefore no ground whatever for the attempted assessment and summary sequestration and sale of the whole first mortgage debt with its security, for the payment of the commissions and other amounts allowed by the decree. For any costs that may have been incurred by reason of the filing of the cross-bill by Tome, and for any proper proportion of the expenses incurred in the abortive efforts to sell the property for the common benefit of both sets of mortgage bondholders, Tome as trustee is chargeable, but not for the commissions and amounts to indemnify the receivers. If the fund in Court be not sufficient to afford adequate compensation and indemnity to the receivers, the parties at whose instance they were put upon the property should be required to provide the means of payment.”

That a *stranger* to the record in a receivership proceeding does not admit the rightfulness of the receiver's appointment or possession by participating in the proceedings, as does a *party* to such an action, is recognized by the Supreme Court of California in the recent case of *Fidelity Savings & Loan Assoc. v. Citizens Trust & Savings Bank*, 62 Cal. Dec. 222. There the receiver seized property belonging to the plaintiff, a stranger. While the property was in the receiver's possession it yielded an income, which he also took and held. The owner

applied to the Court appointing the receiver for the restoration of the property, and the application was granted; but the owner did not apply for the restoration of the money collected by the receiver while the property was in his charge. For this money the owner sued the receiver in his individual capacity. In defense the receiver argued that the action could not be maintained because the owner had submitted the property to the jurisdiction of the Court appointing the receiver by appearing in that Court and obtaining relief as to a portion of the property. The Supreme Court of California refused to uphold the receiver's contention, saying:

“When the wrongful taking took place the plaintiff had its option to proceed in either of two ways. It could treat the order as ineffectual to authorize the taking and void to that extent and sue in the state courts for the recovery of the possession of the property, or it could upon the same ground apply to the district court in which the bankruptcy proceeding was pending for an order in that proceeding restoring possession to it. It is true that it made such application to the district court for the restoration of the hotel property and it was given to it in accordance with its application, the court holding that the taking of the hotel by the receiver was without authority and that the trustee had no right to the possession thereof. It does not appear, however, that the plaintiff ever made any application to the district court or the referee for the return of the money obtained by the defendant as receiver from the operation of the hotel while it was in possession thereof. That relief was not included, so far as appears,

in the application for the restoration of the hotel property, and it follows that the defendant did not in any manner waive its right to take either of the two courses above suggested by any submission to the jurisdiction of the court with respect to said money. It had the right therefore to resort to the ordinary action for damages for trespass in order to recover the money from the receiver."

On principle there is no difference between that case and the case at bar. Here, as there, consequences are claimed as the result of the owner's participation in the receivership proceedings, namely, conferring jurisdiction on the court over the property, a jurisdiction it would not otherwise possess. The contention might be well taken if the person participating were a party to the proceedings, against whom some relief was sought, and who had an interest in the subject matter of the litigation; but it is an extremely strained contention when applied to a stranger to the record, and if upheld would lead to incalculable injustice and wrong, as the case at bar distinctly exemplifies.

**PLAINTIFF IN ERROR'S PARTICIPATION WAS HOSTILE TO
THE RECEIVER'S POSSESSION.**

Plaintiff in error's request relative to the bond was for some security from Gerlinger, the plaintiff in the State Court case, against damages it might sustain by reason of the receiver's acts if his ap-

pointment was wrongful. The bond given in compliance with this request merely furnished plaintiff in error additional protection against loss it might sustain by reason of the receiver's seizure. The receiver had already seized the property and had it in his possession when plaintiff in error made its request. The wrongful act had been already committed by the receiver. The bond requested and given was not one for the faithful performance of the receiver's duties, required to be given by the receiver. It was a bond required of the party on whose application the receiver was appointed, in accordance with section 566 of the Code of Civil Procedure of California, which is as follows:

“No party, or attorney of a party, or person interested in an action, or related to any judge of the court by consanguinity or affinity within the third degree, can be appointed receiver therein without the written consent of the parties, filed with the clerk. If a receiver is appointed upon an ex parte application, the court, before making the order, must require from the applicant an undertaking with sufficient sureties, in an amount to be fixed by the court, to the effect that the applicant will pay to the defendant all damages he may sustain by reason of the appointment of such receiver and the entry by him upon his duties, in case the applicant shall have procured such appointment wrongfully, maliciously, or without sufficient cause; *and the court may, in its discretion, at any time after said appointment, require an additional undertaking.*”

In any such case it would seem to be the right of any person interested to bring to the Court's atten-

tion, after the appointment was made, notice of the fact that the bond given was defective or insufficient, so that the interests of all parties would be protected. Surely the defendant himself in such a case, by making such request, would not be estopped from afterwards claiming that the appointment was wrongful; and if that be true, it is not apparent why a stranger to the record, pursuing the same course, should be placed in a worse position.

When plaintiff in error asked security against the receiver's wrongful acts (and his seizure of this property was a wrongful act) its request cannot possibly be construed as an admission that those acts were rightful. Its request, if of any significance, was notice that it claimed the acts were wrongful.

The other act of participation by plaintiff in error in the proceedings in the State Court was a special appearance at the hearing of the receiver's motion for an order directing him in his duties, and approving the order of the State Court made as a result of that hearing (Tr. pp. 38-43). One of the purposes of said motion, as is apparent from its contents, was to obtain explicit directions as to the manner in which the business of the alleged (but non-existent) copartnership should be conducted,—in other words, how plaintiff in error's property should be sold. The record shows (Tr. pp. 39-40) that attorneys representing plaintiff in error were present at the hearing of said motion and requested the Court to make no order respecting the sale of

the property until they could communicate with their client and ascertain the facts and their client's wishes. The order made by the State Court on May 28, 1920 (Tr. pp. 40-43), shows distinctly that plaintiff in error did not thereby "recognize" the rightfulness of the receiver's possession, as it provided that no sale of any of the property should be made without plaintiff in error's consent prior to June 10, 1920, during which interim plaintiff in error was to advise with its counsel and determine in what manner it would assert its rights and protect its interests.

Of course, plaintiff in error "recognized" the receiver and his possession, as those were actualities nobody could deny; but that by its said acts it recognized the *rightfulness* of his appointment, or the *rightfulness* of his possession, is a conclusion contrary to the inherent character of the acts themselves.

And we must not lose sight of the fact that the sole justification of the order of the State Court of April 15, 1921, attempting to charge the expenses of the receivership against plaintiff in error's property, and the sole justification of the conditional judgment awarded plaintiff in error by the trial Court, was that plaintiff in error, by the acts referred to, recognized the rightfulness of the receiver's appointment and the rightfulness of his possession. Once conceding that plaintiff in error's

acts were not attended with such consequences, the trial Court had no alternative to giving judgment for the return of the property unconditionally.

**IF RECEIVER'S POSSESSION WAS RIGHTFUL PLAINTIFF IN
ERROR WAS ENTITLED TO NOTICE BEFORE ITS
PROPERTY COULD BE CHARGED.**

But what is the result if we concede that plaintiff in error by its said acts recognized the rightfulness of the receiver's possession?

Our answer is that the order of the State Court of April 15, 1921, attempting to charge the property with a lien for the expenses of the receivership was absolutely void, for the reason that plaintiff in error was given no opportunity to be heard when said order was made. If plaintiff in error's participation in the State Court action gave that Court jurisdiction over the property that it otherwise would not have had, plaintiff in error was entitled to notice of any proceeding in which such acquired jurisdiction was attempted to be exercised. If plaintiff in error's acts were attended with the consequences claimed by the receiver, they were also attended with the privileges accorded to any party to a proceeding and could not be ignored. On the other hand, if the receiver's possession was the result of his trespass, plaintiff in error's claim was hostile to the property or fund in his hands, and in that event plaintiff in error had no right to be heard on the

settlement of his account. (*Black v. Black*, 93 Fed. 346). The order of the State Court confirming his account and charging a lien against plaintiff in error's property without giving plaintiff in error an opportunity to be heard cannot be justified if at the same time it is contended that plaintiff in error by its acts recognized the receiver's possession as rightful. The positions are inconsistent.

It is not claimed on behalf of the receiver, nor indeed could it be with any merit, that plaintiff in error by its said acts made itself a party to the State Court action. It was not contemplated by anybody, either by Gerlinger or by Hickok or by the receiver or by the State Court itself, that plaintiff in error had subjected its person or its property to the jurisdiction of that Court. The case of *Gerlinger v. Hickok* proceeded to trial and judgment on the theory that plaintiff in error was a stranger to those proceedings. The Judge of the Court below recognized that to be the situation when he said:

“Of course you did not subject yourself to the general jurisdiction of that Court.”

By some inexplicable process of reasoning the theory seems to be that plaintiff in error waived the receiver's trespass and acknowledged his possession to be rightful without thereby making itself a party to the proceedings, and that because of such waiver and acknowledgment the State Court acquired power to impose burdens upon the property.

But if citation is required before a Court can exercise jurisdiction over property seized in proceedings *quasi in rem* (*Freeman v. Alderson*, 119 U. S. 185; 30 L. Ed. 372), and if a party is not bound by a judgment in a proceeding wherein he has no right or opportunity to control the defense, or to introduce or cross-examine witnesses, or to prosecute a writ of error (*Hale v. Finch*, 104 U. S. 261; 26 L. Ed. 732), by what authority can a Court charge the expenses of a receivership against the property of a *stranger* to the record? We venture the assertion that not a single precedent can be found to support an order made under such circumstances. Such an exercise of judicial authority would be directly in conflict with the due process clauses of the Constitutions of the United States and of the State of California. As the Supreme Court of California said in the case of *Fidelity Savings & Loan Assoc. v. Citizens Trust & Savings Bank*, 62 Cal. Dec. 222, before cited:

“The real contention, and it is well taken, is that the seizure was not within the authority conferred by the order, that the property which it gave authority to take and hold was the property of the bankrupt; not that of third persons. The right of the plaintiff to keep possession of the hotel could not be divested, except by an order made in a proceeding to which it was a party and in which it had been given an opportunity to be heard. To take it in any other manner would be to deprive it of its property without due process of law, a thing forbid-

den both by our constitution (art. I, sec. 13) and by the constitution of the United States (arts. V, XIV, sec. 1)."

Even if the State Court otherwise had the power to make the order assailed, still that order was void and subject to collateral attack for the reason that it was made without notice to plaintiff in error. Even if the case presented were stronger; even if plaintiff in error had been named a party defendant, and even if circumstances were disclosed showing equitable grounds for the appropriation of its property for the payment of the expenses of the receivership, still the order of April 15, 1921, would be subject to collateral attack in the replevin action, since there was an entire want of notice, and without notice the Court was without jurisdiction.

"When a judgment is brought collaterally before the Court as evidence, it may be shown to be void upon its face by a want of notice to the person against whom judgment was entered."

Webster v. Reid, 11 How. 437; 13 L. Ed. 761.

"It is an equally well-settled rule in jurisprudence, that the jurisdiction of any Court exercising authority over a subject may be inquired into in every other court, when the proceedings in the former are relied upon, and brought before the latter, by a party claiming the benefit of such proceedings."

Williamson v. Berry, 49 U. S. 495, 540; 12 L. Ed. 1170, 1189.

And in *Guaranty Trust Co. v. Railroad Co.*, 139 U. S. 137; 35 L. Ed. 116, the Supreme Court of the

United States held a judgment void and subject to collateral attack where it appeared that there was a failure to make service of process by publication as required by the statute.

The trial Court observed that it could not inquire into the value of the receiver's services, or the services of his attorney. That is true. But the trial Court was not called upon to do anything of that kind. Plaintiff in error was not concerned with the amount the State Court allowed the receiver and his attorney. Its concern was with the attempt to make that allowance a lien against its property, and since the order of the State Court attempting to do this thing was void because it lacked jurisdiction of either the person or the property of plaintiff in error, it was the duty of the trial Court to so declare and to order judgment for plaintiff in error for the return of the property replevined free of any charge against it on behalf of the receiver.

**EFFECT OF ORDER PERMITTING REPLEVIN ACTION
TO BE BROUGHT.**

The order of the State Court appointing the receiver directed him to "proceed immediately to take possession of the assets of said partnership of plaintiff and defendant and of said Sterling Tire Company of California" (Tr. p. 23). It did not direct him to take the property of third persons, and when he took plaintiff in error's property he was a trespasser.

Plaintiff in error then had the option to sue the receiver in his individual capacity for damages for trespass in order to recover the property from the receiver, or it could, the State Court permitting, bring replevin against the receiver in his official capacity. The second alternative was selected, and the requisite permission was granted by the State Court (Tr. pp. 43-44). Express permission was given to bring the action in the Federal Court. Pursuant to that permission this action was commenced on June 11, 1920, the property taken from the receiver and delivered to plaintiff in error. From that date the property ceased to be in the possession of the State Court; and when that Court granted permission to the Federal Court to entertain and exercise jurisdiction over the property in replevin proceedings, which implied a determination by the Federal Court of who was entitled to the possession of the property at the date of the commencement of such proceedings, plaintiff in error maintains that so long as the Federal Court retained and was attempting to exercise the jurisdiction it possessed the State Court was without power to give any judgment which would prevent the Federal Court from granting complete relief to the litigants before it.

To sustain an action of claim and delivery in California the plaintiff must have a right to the immediate and exclusive possession of the property sought to be recovered. (*Garcia v. Gunn*, 119 Cal. 315). The only issue before the Court below was

whether plaintiff in error or the receiver was entitled to the possession of this property on June 11, 1920, the date the action was begun, not on any date subsequent thereto.

The order of the State Court attempting to charge a lien against the property was not made until April 15, 1921, over ten months after the property had been taken from the receiver in the replevin action. There was no charge of any kind against the property when it was taken under the replevin writ. At that time no lien on behalf of the receiver was in existence.

Under these circumstances, we submit, if plaintiff in error was entitled to any relief at the hands of the trial Court it was entitled to a judgment for the property free and clear of any claim on behalf of the receiver. If the right to the immediate and exclusive possession was in plaintiff in error on June 11, 1920, it was entitled to an unconditional judgment for the property. If, on the other hand, the order of the State Court of April 15, 1921, was of any validity as against the property and the Federal Court was obliged to recognize it, it must be admitted that such validity was derived from an undeniable right of immediate and exclusive possession in the receiver on June 11, 1920. In that case the trial Court should have given judgment in favor of the receiver. Either judgment should have been for plaintiff in error without any condition or it should have been for the receiver.

That the judgment should have been for plaintiff in error unconditionally is obvious from the fact that the only question before the trial Court was the right of possession on June 11, 1920, and on that date no charge against the property on behalf of the receiver was in existence; but we submit that the same conclusion results from the granting of leave by the State Court to bring this replevin action against its receiver. It is our contention that after the State Court granted permission for a replevin action to be brought against its receiver in the Federal Court, and after such an action was commenced and the jurisdiction of the Federal Court invoked, the State Court was without power, under the rule of comity between courts, to make any order concerning the property that would in the slightest degree limit the scope of any judgment the Federal Court might subsequently give, and which it could give pursuant to the State Court's order permitting the action to be brought. Or, to view the proposition from the other side, if the Federal Court was bound to recognize the order of the State Court of April 15, 1921, it should not have entertained jurisdiction of the cause at all, but should have ordered a dismissal.

If the State Court, through its receiver, was rightfully in possession of this property it could not be compelled to surrender that possession; but there was nothing to prevent it from surrendering such possession voluntarily and permitting another Court

of concurrent jurisdiction to exercise dominion over the property. That is exactly what the State Court did; and when the jurisdiction of the Federal Court was invoked under these circumstances it became the right and duty of that Court to fully perform and exhaust its jurisdiction and to decide every issue in the case. It is our contention that the effect of the State Court's permission to have the property taken in replevin proceedings in the Federal Court was to place the Federal Court in the position of having been the first to acquire jurisdiction, and being in such position it should have exercised that jurisdiction without regard to any subsequent attempt of the State Court to hinder or limit its authority. In proceeding on that theory the Federal Court would not have violated the rule of comity between the Federal and State Courts; but the State Court did violate that rule when it made its order of April 15, 1921, and for that reason said order should have been ignored by the Federal Court.

Under these circumstances a determination of the rights of the parties in the replevin action regardless of the State Court's order would not be a collateral attack on that order. And that, we submit, is the conclusion to which we are forced. The Federal Court was in a position to award plaintiff in error full relief, and it should have done so. The Federal Court was not called upon to revise the State Court's order. It should have ignored that order. It had the right and the power to adjudicate un-

affected by that order and to enforce its judgment regardless of that order.

The case of *James Freeman Brown Co. v. Harris*, 139 Fed. 105, is not unlike the case at bar. In that case plaintiff brought replevin and took its property from the defendant, who, as receiver in a State Court action, had seized the property. The replevin action was brought after leave to do so was granted by the State Court, just as in the case at bar. The lower Court found for the defendant, stating:

“It may be that upon the hearing the plaintiff may be able to assert an undoubted right to possession of the goods. The case before me does not enable me to form any opinion on that point. All that I decide and all that I can decide, is that the goods having been left in possession of the Fairmont Mills, in circumstances which have given rise to claims adverse to the plaintiff, and having come into the hands of a receiver of a court of competent jurisdiction, who holds for the benefit of all concerned, and it appearing that such adverse claimants are proceeding to assert their rights in the state court, this court, from consideration of comity, ought not to interfere with such possession. The parties claiming adversely are not before it, and, without hearing them, it is impossible to say that the plaintiff has an unquestionable right to possession.”

The Circuit Court of Appeals refused to approve this position, and said:

“We fully appreciate the desire of the learned judge at the trial in this case to observe the comity which exists between the federal and

state courts, and which should, at all times, be carefully guarded; but, with due deference to him, we are of opinion that, after the state court (in which the original case was pending) had signed an order authorizing the plaintiff to bring suit to enforce whatever right he claimed to the property in question against the receiver, 'in any court of competent jurisdiction', it was no invasion of the rule of comity to bring the action in the Circuit Court of the United States, since it fully appears by the pleadings that jurisdictional requirements, both as to parties and value of property in controversy, exist."

The Circuit Court of Appeals, after quoting from *Porter v. Sabin*, 149 U. S. 479; 37 L. Ed. 815, to the effect that it is for the Court appointing the receiver to decide whether it will determine for itself all claims against the receiver, or will allow them to be litigated elsewhere, concluded as follows:

"We think that the order of the state court was ample to authorize the plaintiff to bring suit against the receiver in any forum, either state or national, having jurisdiction, for its terms are that the petitioner have leave to bring suit, 'in any court of competent jurisdiction against the receiver of said mills, to enforce its said contract and to settle and determine the rights of the parties thereunder', and we do not agree with the contention of the defendant that this meant only that the scope of the suit should be limited to a construction of the contract. The authority was to determine the rights of the parties under the contract. The right that plaintiff claimed was the ownership of the property, and this was the issue raised by the pleadings. The plaintiff and defendant submitted an agreed

statement of facts in this case, upon which the presiding judge should have rendered a decision; but instead of determining the case upon a consideration of its merits, he proceeded upon an erroneous idea of comity, and still entered a judgment which is, in our opinion, final and conclusive. If the comity of jurisdiction forbade the entertainment of the action by the Circuit Court, the same should have been dismissed without prejudice, thus leaving the plaintiff to pursue his remedy before some other proper tribunal. But it is clear to us that the plaintiff had full authority under the terms of the order of the state court (it appearing that the necessary jurisdictional requirements existed) to bring suit in the Circuit Court for the possession of the property described, and that, upon the trial, the case should have been determined on its merits."

In the case at bar the order granting permission to sue the receiver (Tr. pp. 43-44) expressly authorized the action to be brought in the Federal Court, and it expressly authorized a replevin action to be brought, or any other form of action, "to determine the right of ownership or possession of any or all of the property seized and now possessed by said receiver". This is a more definite and comprehensive authority than the one considered by the Circuit Court of Appeals in the case from which we have just quoted. If in that case it was not only the right but the duty of the Court, by virtue of the authority contained in the order permitting the suit, to determine the case on its merits, it was the right and duty of the Court below to do likewise.

The right and duty arose from the authority granted by the Court which appointed the receiver. After such authority had been granted, and while it remained unrevoked, we submit that the Court entertaining jurisdiction of the cause could not be limited in the exercise of its powers within the scope of that authority.

In the case at bar the Court below was authorized to determine who was entitled to the possession of this property on June 11, 1920, the date of the commencement of the action. That authority was never revoked. The Court found that plaintiff in error and not the receiver, was entitled to the possession at that time. Having so found, we submit it was the duty of the Court to award us that possession unconditionally, and to disregard the order of the State Court of April 15, 1921.

It is not necessary to comment on the action of the State Court in making an order of this kind, when the owner of the property was not before it, after it had permitted the property to be taken from its possession, and while the Court to which it had granted permission to take the property and to determine the merits of the case was entertaining jurisdiction. But it is well to note that, as the record shows, the case of *Gerlinger v. Hickok* went to trial on March 2, 1921. The record does not show, but it is a fact that will not be disputed, that on March 21, 1921, the trial of that action was com-

pleted, and on that day the trial Judge announced his decision in favor of the defendant Hickok. Between that date and April 20, 1921, when findings were signed, the order of April 15, 1921, attempting to charge a lien against plaintiff in error's property, for the payment of the expenses of the receivership, was made. After the Court had determined that the plaintiff Gerlinger was not entitled to any relief, and after determining that there was no partnership or partnership property, and that the appointment of the receiver was wrongful, and when the property was no longer in its possession, it was a remarkable and wholly unwarranted act to attempt to assess the expenses of the receivership against the property of an innocent party, a stranger to the proceedings. Gerlinger, at whose instance the receiver was appointed, was the party to be made to pay. The receiver was not obliged to defend this replevin action. He was not ordered to defend it, and he did not demand any security for his services in defending it from the person who procured his appointment. Under such circumstances he has himself to blame if he must go without compensation.

This property was in the receiver's possession from May 10, 1920, to June 16, 1920, a period of only thirty-six days. The receiver was allowed \$2500 for his services and for the services of his attorney, as the record shows. That allowance was not made until March 2, 1921 (Tr. p. 45). It is fair to assume under these circumstances that the bulk

of the allowance was on account of defending the replevin action. But it will be observed that these were not expenses incurred in the care and preservation of the property and which plaintiff in error would have had to pay independently of the receivership, nor is the order of April 15, 1921, sought to be sustained on this ground.

In *Weston v. Watts*, 45 Hun. 219, it is said:

“To take a person’s property from him by an unauthorized proceeding, and place it in the hands of a receiver, and then subject him to the expenses of the proceeding, would be very transparently unjust, even if the courts had the power to do that. Cases are not uncommon where the result would be ruinous to the injured individual. * * *

“The claim now made in behalf of the receiver has, by no law, been imposed upon the defendant. Neither is there any equitable principle which should require him to pay, before he can secure a return of his property, the expenses of the unlawful proceeding by which it has been taken and withheld from his possession. To require that payment from him or his property would be a wrong which the court has neither the power nor the disposition to inflict upon him. It may be a hardship upon the receiver himself, but it is one of the risks which he has voluntarily assumed. He could have avoided it by declining to accept the appointment or protected himself against the loss of his commissions and expenses by first requiring security from the plaintiffs for their payment. If they cannot now be made to pay, it is more just and equitable that the receiver shall be deprived of his fees and expenses than

it would be to require the defendant to defray the expenses of an unauthorized proceeding, and the cost of depriving him thereby of the possession of his property."

In *Howe v. Jones*, 66 Iowa 156; 23 N. W. 376, the Court says:

"The receiver was appointed on the application of Howe & Co. and was ordered to take charge of the property on their representation that it belonged to Binfords and was subject to be appropriated to the satisfaction of their judgments against Binfords. But it has been determined in the course of the proceedings that it did not belong to Binfords, but that the intervenors were the owners of it, and were entitled to the possession of it, and that no portion of it could be appropriated to the payment of Howe & Co.'s judgment. The possession of the property by the receiver was from the beginning a violation of the intervenors' rights, and every step which has been taken, and every act which has been done, by the receiver with reference to the property, has been done and taken against their protest, and has tended to defeat their rights; and we know of no principle upon which they ought now to be compelled to pay or to contribute in the smallest degree to the payment of the costs incurred in this attempt to deprive them of their property.

"The receiver is entitled, perhaps, to be compensated for his services, and to be reimbursed for his expenses, but for this he must look to the party at whose instance he was appointed. It was said by this Court in the last appeal, it is true, that if the disbursements, etc., were made in good faith, were necessary, and were beneficial to the parties ultimately entitled to the fund, there was no reason why

they should not be paid from the fund. *This would undoubtedly be the true rule if the party entitled to the fund was a party to the proceedings in which the receiver was appointed.* But the intervenors were in no proper sense parties to the receivership. The proceedings were instituted for the purpose of appropriating the property of Binford Bros. to the payment of the judgments which Howe & Co. had obtained against them. *No interest of the intervenors was sought to be subserved by it, nor was it instituted for the establishment of a right as against them. They became parties to it for the purpose of asserting their ownership of the property in the hands of the receiver; and when their right to it was established it ceased to be a fund in the hands of the receiver.* It was then determined that it was not subject to be appropriated to the object to which it was sought by the proceedings to appropriate it, and their right to it, as against the receiver and all the parties to the proceedings, was fully established. Nothing has been done by the receiver for their benefit, and it is not clear by any means that they will receive any advantage from what he has done, and we think it clear that they ought not to be charged with the costs or expenses attending the proceedings.”

In *Highley v. Deane*, 168 Ill. 272; 48 N. E. 52, the Supreme Court of Illinois says:

“Where the receivership is procured under the assertion of an unjust and wrongful claim, as finally found by the Court, and the receiver is authorized to take possession of the property of another on such wrongful assertion, the court can protect the injured party by returning the property of which he was divested without its being diminished to pay receiver’s charges. * * *

“And the Courts almost uniformly hold in the case of intervenors that, where the receivership is not requested by them, and they obtain no benefit from it, they or their property are not liable for any of the costs or expenses.”

The Supreme Court of California, in the case of *Ephraim v. Pacific Bank*, 129 Cal. 589, speaking of the receiver, says:

“If he has taken property into his custody under an irregular, unauthorized appointment, he must look for his compensation to the parties at whose instance he was appointed, and the same rule applies if the property of which he takes possession is determined to belong to persons who are not parties to the action, and is taken from his possession by paramount authority. *As to such property his appointment as receiver was unauthorized and conferred upon him no right to charge it with any expenses.*”

II.

THE TRIAL COURT HAD POWER TO AWARD DAMAGES FOR THE DETENTION OF THE PROPERTY.

The second error assigned involves the question of whether in a replevin action where the trial Court finds for the plaintiff, the defendant being a receiver and sued in his representative capacity, damages may be awarded for the detention of the property. The Court below was of the opinion that since the action was against “the mere arm of a court of sister jurisdiction” plaintiff in error was “not entitled to anything in the nature of damages

for the detention'', and thereupon refused plaintiff's request for this relief and ordered judgment for the return of the property, but without damages and without costs.

The general rule, which is applicable here, is that unless the property has a usable value interest on the value of the property constitutes the measure of damages.

34 Cyc. 1560-1564.

The value of the property replevined was \$100,000. It was so alleged in the complaint, and this allegation was expressly admitted in the receiver's answer.

The receiver seized the property on May 10, 1920 (Tr. p. 35). The property was taken from the receiver on June 16, 1920, as is shown by the Marshal's return (Tr. p. 8). The legal rate of interest in California is 7%.

If, therefore, plaintiff in error was entitled to damages for the detention of the property it was entitled to an amount equal to 7% of the sum of \$100,000 for a period of thirty-six days, amounting to \$690.40, together with its costs of suit.

The authorities are all to the effect that a judgment against a receiver in his official capacity ordinarily has no greater effect than to establish the existence and amount of the liability, but in these particulars it is conclusive. The time and manner of payment of the judgment are controlled by the

Court appointing the receiver, and are payable only from funds in his hands.

34 Cyc. 445-446.

We know of no authority precluding a Court which has received permission to entertain jurisdiction of a cause against a receiver from giving judgment covering every issue involved. That was all the trial Court was requested to do in this case. Plaintiff in error was entitled to damages for the detention of its property, and this was an incident of the replevin action which the State Court permitted the Federal Court to determine. The judgment could just as properly provide for damages and costs as for the return of the property itself.

The trial Court was not deprived of the power to give such a judgment merely because it lacked the power to enforce such a judgment when given. The judgment might be unenforceable because of lack of funds in the receiver's hands to satisfy it, or other claims against the receiver might take priority over it; but those would be matters to be determined in the State Court after the Federal Court had given its judgment.

The Court below had the power to award the physical possession of the property to plaintiff, and to enforce its judgment to that extent, because those were incidents inseparable from the order of the State Court permitting the possession of the property to be taken in the replevin action. It also had

power to award judgment for damages and costs, as those were incidents inseparable from the determination of a replevin action; but since there was no property, except the property replevined, over which it had jurisdiction, it could not enforce the payment of a judgment for damages and costs. Such part of the judgment could be enforced only by application to the State Court.

The trial Court apparently was of the opinion that because it had no power to enforce such a judgment it had no power to give it. The authorities on the subject are well-settled to the contrary. (See the foregoing citations.)

Another trial of this action is not necessary. Full relief can be accorded by a modification of the judgment, and we respectfully submit that the judgment of the Court below should be modified by ordering the return of the property to plaintiff unconditionally, with damages for its detention in the sum of \$690.40, and costs of suit.

Respectfully submitted,

McNAIR & STOKER,
Attorneys for Plaintiff in Error.

No. 3794

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

STERLING TIRE CORPORATION (a corporation),
Plaintiff in Error,

vs.

JOHN M. SULLIVAN, as Receiver of an alleged
co-partnership consisting of E. E. GER-
LINGER and G. R. HICKOK and trading under
the fictitious name of STERLING TIRE COM-
PANY OF CALIFORNIA, and E. E. GERLINGER,
Intervenor,

Defendants in Error.

BRIEF FOR DEFENDANT IN ERROR,
JOHN M. SULLIVAN, AS RECEIVER, JOINED IN
BY INTERVENOR, E. E. GERLINGER.

EDGAR D. PEIXOTTO,
Attorney for Defendant in Error,
John M. Sullivan, as Receiver.

ROY A. BRONSON,
Attorney for Intervenor,
E. E. Gerlinger.

FILED

FEB 24 1922

F. D. MONCKTON,
CLERK

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Defendants in Error.

**BRIEF FOR DEFENDANT IN ERROR,
JOHN M. SULLIVAN, AS RECEIVER, JOINED IN
BY INTERVENOR, E. E. GERLINGER.**

Facts.

The facts of this case pertinent to the position of defendant in error, who it must be at all times remembered is an arm of the State Court, are briefly as follows:

On May 5th, 1920, one Gerlinger commenced an action in the Superior Court of San Francisco against one Hickok, claiming that the Sterling Tire

Corporation of California was the fictitious name of a co-partnership consisting of himself and Hickok, and that the partnership assets consisted of a certain contract with plaintiff in error, which contract involved and carried with it the possession and right of sale of certain tubes and tires, which tubes and tires are the identical property that are sought to be replevined in the instant case. It was admitted and conceded that these tubes and tires were in the possession of the defendant Hickok by reason of the act and by and with the consent of plaintiff in error. Relief was asked by way of adjustment of the partnership differences and pending litigation, the appointment of a receiver to take possession of the partnership assets and conduct the partnership business. The State Court after due proceedings appointed the defendant in error, receiver. There is no doubt that the State Court had jurisdiction to appoint a receiver and that it was an action in which the appointment of a receiver was lawful and proper. The jurisdiction to appoint has never been questioned by any party or person interested in the transaction.

The order appointing the receiver authorized him to take possession of the tires and tubes consigned to the Sterling Tire Company of California by the Sterling Corporation of New Jersey (the plaintiff in error), which tires admittedly were in the possession of the defendant Hickok by order and authority of plaintiff in error (Tr. pages 33-34). The receiver duly qualified and on or about May 10th, 1920, took

possession of the tires and tubes herein involved. Gerlinger, the plaintiff, was represented in the State Court by Mr. Bronson; Hickok, the defendant by Mr. Harron, and the receiver by Mr. Peixotto. A motion was made by Mr. Harron on behalf of the defendant to raise the bond of the receiver to \$5000.00 which motion was granted by the Judge of the State Court. A motion was then made to vacate and dismiss the order appointing the receiver; said motion was heard on May 19th and 21st and was denied by the Court on May 21st, 1920 (Tr. page 27). At the hearing of this motion to discharge and vacate the receiver, Mr. Harron stated that he had been authorized to represent the Sterling Tire Corporation (the plaintiff in error) and Mr. Harron read in open Court a telegram from the Sterling Tire Corporation of Rutherford, New Jersey (plaintiff in error) authorizing him to act as their attorney and protect their interests (Tr. bottom page 35 top page 36). This appearance in the State Court by plaintiff in error was without reservation, it was not special, and at such appearance Mr. Harron as attorney representing the Sterling Tire Corporation (plaintiff in error), moved the State Court to order a bond be furnished in favor of the Sterling Tire Corporation, plaintiff in error, stating that property upon which the Sterling Tire Corporation had interests was of great value and the Sterling Tire Corporation wished a bond to protect it against damage. The State Court granted the motion of the Sterling Tire Corporation (plaintiff in error) and ordered plaintiff to give a bond in the sum of \$5000 running not

only to the defendant, Hickok, but to the Sterling Tire Corporation, plaintiff in error, who had voluntarily appeared without reservation and moved the Court to grant the giving of this bond for its further protection (Tr. page 36). A surety bond was thereupon furnished and in part reads as follows (Tr. page 37):

“Now therefore, we the undersigned, in consideration of the premises and the appointment of a receiver herein, do jointly and severally undertake in the sum of \$5000 and promise to the effect that in case said receiver shall be appointed that plaintiff will pay to said defendant or Sterling Tire Corporation of Rutherford New Jersey or National Finance Co., a corporation, such damages not exceeding the sum of \$5000 which defendant or Sterling Tire Corporation of Rutherford, New Jersey or said National Finance Co. may sustain by reason of the appointment of said receiver and the entry by him upon his duties in case the plaintiff shall have procured such appointment wrongfully.”

After the furnishing of this bond for the protection of plaintiff in error upon its appearance and on its motion made by its duly authorized attorney who appeared generally in the action in the State Court by the same, the Court denied the motion to vacate and dismiss the receiver and the motion was never appealed from and the matter of the proceeding of the appointment of the receiver was accepted as final and the receiver continued to act. Upon the receiver's status being thus settled by the Court and there being no appeal therefrom, the receiver gave notice to Mr. Bronson, attorney for plaintiff, and to

Mr. Harron, attorney for defendant (Mr. Harron being the same attorney who had appeared and announced that he was authorized and did represent the Sterling Tire Corporation of Rutherford, New Jersey (plaintiff in error), of notice of motion of receiver for direction and compensation. This notice is set forth in Transcript on pages 38 and 39, and asks for an order directing the course and conduct of the receiver with reference to the mode and manner of carrying on the business and upholding the partnership of the property pendente lite, for compensation to himself and attorney, for such other and further orders as may be necessary for the preservation of the property and the conservation of the rights of all the parties. This motion was heard by the State Court on the 27th day of May, 1920, notice of which as has heretofore been said, was given to Mr. Harron, attorney for Sterling Tire Corporation, plaintiff in error. At the hearing of this motion, Mr. George E. Stoker appeared and stated that he had been retained by the Sterling Tire Corporation and was to be associated with Mr. Howard Harron on behalf of the Sterling Tire Corporation and requested that no order be made respecting the sale or disposition of the tires until he could communicate with the Sterling Tire Corporation and ascertain their wishes and the facts of the case. The matter was heard and argued before the said Court and thereafter an order was prepared by the various attorneys, which order was practically a consent order having been O. K. ed and consented to by each one of the attorneys and is set forth in full on pages

40, 41, 42 and 43 of the Transcript. This order was in effect a recognition of the receiver of the State Court of his possession of the property and a request by all of the parties that the receiver hold the possession pending the determination of the Sterling Tire Corporation as to whether or not it should intervene, and in the event that plaintiff in error did not intervene, "then said receiver shall hold all of said automobile tires and tubes intact to abide the further order of this Court". The receiver was further authorized pursuant to the consent order made by the State Court to sell said tires and tubes with the future consent and upon such terms as may be approved by the Sterling Tire Corporation or its authorized agents, and the matter of fixing of fees by the receiver and counsel fees was continued by consent of all parties until the further order of this Court. As previously stated, this order was by the consent of attorneys representing all of the parties, including the Sterling Tire Corporation and this order by its very terms contemplated by consent of all parties the continued possession and functioning of the receiver, and the receiver continued under the authority of this Court to possess, hold, and keep this valuable property for the benefit of all concerned. On the occasions of the appearance of plaintiff in error in the State Court there was never any objection to the jurisdiction of that Court as to the person or property, but on the contrary, plaintiff in error asked and received substantial relief.

This action was commenced on the 11th day of June, 1920, to replevin the property from the possession of the receiver and after the commencement of the action and on the 14th day of June, 1920, the Sterling Tire Corporation of Rutherford, New Jersey, plaintiff in error, procured an order from the State Court permitting it to sue the receiver, the order reading: "Dated this 14th day of June, 1920, as of the 14th day of May, 1920."

The defendant, the receiver, made a motion in the Court below to stay, dismiss and abate the action upon the grounds of lack of jurisdiction in the Federal Court and setting forth the pending matters in the State Court. These proceedings have not been carried into the transcript and we will suggest a diminution of the record in this regard should this Court deem that portion of the record necessary. Thereafter, the defendant in error filed his answer.

The answer denies that plaintiff was entitled to the possession, and alleges the possession of defendant as receiver, setting forth in detail the pendency of the litigation in the State Court. We particularly call this Court's attention to Par. XI of the Answer, Transcript page 15, setting up the claim of the receiver to a lien on the property for his fees. The answer also pleads jurisdiction. The order allowing the receiver's compensation and the order confirming the account of the receiver in which the allowance is made by the State Court for \$2676.67, which sums included rental of proper place to store the property as requested by plaintiff

in error and were ordered payable out of the fund or property which came into the hands, possession and control of the receiver under and by virtue of his appointment as such receiver, and that such receiver have a lien on said fund or property for his compensation as set forth on pages 44, 45 and 46 of the Transcript, as also the recognition of the rights of the receiver in the Findings of Fact and Conclusions of Law set forth on page 48 of the Transcript.

Argument.

This is an action in claim and delivery, a successor to the common-law action of replevin. Claim and delivery is a possessory action; it is the lineal descendant of the common-law action of replevin, with the scope of its application greatly enlarged, but the essential object of the action remains the same, namely, to enforce the plaintiff's right to the present possession of chattels, as against a defendant who unlawfully detains them, and to recover their value if possession cannot be had, together with damages for the detention.

Hall v. Susskind, 109 Cal. 203; 41 Pac. 1012.

The issue and sole question in claim and delivery is the right to the possession at the time of the commencement of the action.

Tuohy v. Linder, 144 Cal. 790.

Claim and delivery does not lie where defendant has a lien on personal property dependent upon possession and he is in possession.

Sutton v. Stephan, 101 Cal. 545.

There is no doctrine or rule better known in the Federal practice than the following:

“The Court which first acquires the lawful jurisdiction of specific property by the seizure thereof, or by the due commencement of a suit from which it appears that it is or will become necessary to a determination of the controversy involved or to the enforcement of the judgment or decree therein for the Court to seize, to charge with a lien, to sell, or to exercise other like dominion over the property, thereby withdraws that property from the jurisdiction of every other court so far as is necessary to accomplish the purpose of the suit, and that Court is entitled to retain such control as is requisite to effectuate its final judgment or decree therein, free from the interference of every other tribunal.”

Cases illustrating this rule are undoubtedly familiar to this Court as many of them have been decided by this Court and we will undertake to cite only a certain few cases which clearly illustrate the facts of the instant case:

In McDowell v. McCormick, 121 Fed. 61, at page 65, the Court said:

“Upon the facts thus appearing, the authorities which control the present controversy uniformly establish the doctrine that the proceedings so commenced in the Circuit Court of La Porte County gave to that Court complete and exclusive jurisdiction of the subject-matter—

the res in controversy—with unquestionable right of possession through its receiver. (Citing numerous authorities.) The nature of the action established the custodia legis in the Court wherein the proceedings were first instituted; and this irrespective of any actual seizure of the property, or of violation of the restraining order entered in the primary suit.”

The Court concluding said:

“And the effect of the statement in the bill of exceptions that ‘the evidence tended to show that the suit brought in said superior court was instituted in bad faith’ requires no consideration. The interference with the custodia legis of the circuit court (State Court) violated these canons of the law, and conferred neither possession nor title which can be recognized or enforced in the case at bar.”

The case of Louisville Trust Co. v. Knott et al, 130 Fed. 820, is very much in point and answers very distinctly the argument of plaintiff in error, and we particularly call the Court’s attention to the statement of the Court on page 826:

“In harmony with it, and designed to give it full operation, is another rule, which is that whenever in such case a third party claims some interest in the property which has been subjected to the control of the court, he may intervene in the pending case, and become a party thereto, for the protection of his interest, as explained in *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145; *Gumbel v. Pitkin*, 124 U. S. 143, 5 Sup. Ct. 616, 28 L. Ed. 1128, and numerous other cases of like character decided by the Supreme Court, or if that interest be such that it survives the exercise of the jurisdiction in the pending case, he may stand aloof

and pursue his remedies after the property has been discharged by the Court which has had it under its control. We are not now concerned with suits in personam, in regard to which other reasons may prevail to a different result. The case of *Moran v. Sturges*, 154 U. S. 256, 14 Sup. Ct. 1019, 38 L. Ed. 981, though at first blush it might seem to the contrary, is not in conflict with the current of modern decisions. In that case the claim of the plaintiff was of a maritime nature, of which the federal court alone had jurisdiction. The State Court did not have power to deal with it. The two Courts were not of concurrent jurisdiction. The plaintiff could not by intervention confer upon the State Court a jurisdiction which it did not by law possess. The authority of the Federal Court was paramount and exclusive.

It does not matter that the plaintiff in the present case was not a party to the case in the State Court, or that by reason of his citizenship he had a constitutional right to bring his suit in the Federal Court. Perhaps he might have maintained it there for the purpose of establishing his claim. He could then go into the State Court which had the control of the assets of his debtor, and secure the recognition of his right thus established. *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867. The presumption must be that such recognition would be given by the state Court, and his lawful rights only accorded to him. It is not even charged in his bill that any one is attempting to defraud the plaintiff, or is proceeding without right, or to the prejudice of any right of the plaintiff; and, on the whole record, we can see no other hindrance to the plaintiff by the suit in the State Court than such as is ordinarily incident to legal proceedings."

As we have heretofore pointed out, plaintiff in error did appear in the State Court and was granted

a bond to indemnify it against any loss and was further granted permission to intervene, and if plaintiff in error stood idly by and neglected to protect its rights it can not be heard to complain in this Court. Furthermore, in answer to the argument of plaintiff in error that any of the orders with reference to the receiver were not participated in by the plaintiff in error, we again call the Court's attention to the fact that every one of the orders recite that the attorney, Howard Harron, who had appeared in the Superior Court for plaintiff in error, was present in Court and participated in each and every one of the orders and proceedings and Mr. Howard Harron as one of the attorneys for plaintiff in error in the complaint filed in the instant case.

Ward v. Foulkrod, 264 Fed. 627. This case fully sets forth the rules and collates the authorities. The foregoing rules are stated, the Court saying on page 631:

“Thus arises a rule of comity. It is based on infringement of the jurisdiction of one Court by the action of another court, not where conflict has arisen from differences in the two actions, but where dominion of the subject matter has been acquired under one action, or where the two actions are substantially the same, and where the orderly administration of justice and a desire to avoid an unseemly conflict require the Court which last took jurisdiction—though the first to acquire possession of the property—to surrender such possession on appropriate application, to the Court of concurrent jurisdiction which first acquired jurisdiction of the controversy.”

Invariably when a conflict of jurisdiction has been called to the attention of the Federal Court, the Federal Court at all times, if it ultimately takes jurisdiction, protects and enforces the orders, liens and judgment with respect to the property of the State Court, which is illustrated by the case of *Brown v. Crawford*, 254 Federal 146, page 153:

“But, however this may be, the possession was taken from the state receiver by summary process. This, I am convinced, is not in accord with the suggestion of comity existing between state and national courts, and, if persisted in, would lead to unseemly conflict between such courts respecting the possession of property.”

The final order of the Court in this case was the same as the order made by the District Court in the case at bar. On page 154 the Court saying:

“The property, however, should be at once returned to Felix W. Isherwood, the receiver in the State Court, and order of sale under the decree of foreclosure should be stayed pending action in that court.”

In the case of *Phillips v. Noel Const. Co.*, 266 Fed. 603, the Court on page 607 says:

“The contest is between nonresidents, New York and Maryland Court receivers. The plaintiffs can as effectively assert their claim in the Maryland Court as in the Supreme Court of the District of Columbia. It is true that they complain that if the fund is allowed to go to the defendant receivers they intend ‘to apply the proceeds thereof to the payment of the claims of general creditors * * * and to the heavy costs and expenses of their receivership, including large attorney’s fees * * * .’”

The following language is very apt in the case:

“In the final analysis, the record presents, we think, a case for the recognition of the well-established doctrine of comity between courts of foreign jurisdictions. The Maryland Court, we are bound to assume, will do justice to all parties before it.”

See, also,

Sterling v. Seattle, 198 Fed. 913.

The foregoing authorities answer the various arguments of plaintiff in error and point out that plaintiff in error had complete protection before the State Court, which is presumed to do its duty the same as the Federal Court is presumed. On authority of *Louisville Trust Co. v. Knott*, ante, its constitutional right to select the Federal Court as its forum was not interfered with. It could have protected its right by intervention in the State Court which Court gave it that privilege upon its application, and further gave it a bond upon its application, and we most respectfully submit that this Court should under the foregoing rules give protection and verity to the State Court's orders and liens as was done by the judgment of the Honorable Trial Judge.

**PLAINTIFF IN ERROR SUBMITTED ITSELF AND ITS PROPERTY
TO THE JURISDICTION OF THE STATE COURT, AND IS BOUND
BY ITS ORDERS AND THE LIEN DECLARED THEREON BY
THE STATE COURT.**

Plaintiff in error's appearance in the State Court both upon the occasion of the asking and receiving

from the State Court a bond to indemnify it and at the time of its asking for leave to intervene upon the motion of the receiver and the making of the order of May 20th, subjected plaintiff in error and its property to the jurisdiction of the Court and it was the duty of the plaintiff in error to have followed that litigation and to seek full protection of its rights in the State Court. It is no answer to say that its appearance upon the matter of May 28th was special.

“On general principles a statement that a defendant or party makes a special appearance, is of no consequence whatever. If he appears and objects only to the consideration of the case or to any procedure in it because the Court has not acquired jurisdiction of the person of the defendant, the appearance is special and no statement to that effect in the notice or motion is required or could have any effect if made. On the other hand, if he appears and asks for any relief which could only be given to a party in a pending case or *which itself would be a regular proceeding in the case*, it is a general appearance. No matter how carefully or expressly it may be stated that the appearance is special, it is the character of the relief asked and not the intention of the party that it shall or shall not constitute a general appearance which is material.” (See 2 Ency. of Pl. & Pr. 625, notes and cases cited.)

Ex parte Clark, 125 Cal. 389-392.

“It has been uniformly so held, as logically it could not otherwise be held, and, furthermore, that where a party appears and asks for such relief, although expressly characterizing his appearance as special and for the special purpose of objecting to the jurisdiction of the

Court over his person, he as effectually submits himself to the jurisdiction of the Court as though he had legally been served with process." (Citing cases.)

Roberts v. Superior Court, 30 C. A. 714, 720.

Where one appears and asks some relief which can only be granted on the hypothesis that the Court has jurisdiction, it is a submission to the jurisdiction of the Court as completely as if he had been regularly served.

Estate of Waldron, 168 Cal. 759, and cases cited.

"It is to be observed in passing that a party can not be at once in Court and out of Court. He may not in the same breath dispute the merits of the cause alleged against him and deny jurisdiction of the Court over his person.
* * * No words of reservation can make an appearance special which is in fact to the merits."

Crawford v. Foster, 84 Fed. 939-941.

As frequently stated, the appearance and participation of plaintiff in error in the State Court, bound it and its property to the lien declared by the State Court which will be recognized by this Court of coordinate jurisdiction. The appearance was not to the jurisdiction.

THE RIGHTS OF A RECEIVER.

"A receiver being an officer of the Court, provision will be made for his compensation. In cases where the Court has jurisdiction to make the appointment, the amount will be fixed by the Court and ordered paid out of the fund in

the receiver's hands. In the absence of statute, no definite rule governing the allowance can be laid down. Much is left to the sound discretion of the Court, and what is reasonable must be determined from a consideration of the particular circumstances of each case."

4 Pomeroy's Equity, Sec. 1659, page 3872.

The receiver is entitled to receive compensation for his services and reimbursement for his expenditures, in the first instance, from the funds which come into his possession regardless of who is ultimately successful or is ultimately liable to pay them.

Elk Fork Oil & Gas Co. v. Foster, 39 C. C. A. 615; 99 Fed. 495;

Re T. E. Hill Co., 86 C. C. A. 263; 159 Fed. 73;

Hopfensack v. Hopfensack, 61 How. Pr. 508;

Cutter v. Pollock, 4 N. D. 205; 25 L. R. A. 377; 50 Am. St. Rept. 644; 59 N. W. 1062; s. c., subseq. appeal 7 N. D. 631; 76 N. W. 235;

Espeula Land & Cattle Co. v. Bindle, 11 Tex. Civ. App. 262; 32 S. W. 582;

New Birmingham Iron & Land Co. v. Blevens, 12 Tex. Civ. App. 410; 34 S. W. 829.

A case very similar to the case at bar only the jurisdictions being reversed, is the decision in Ford v. Gilbert, 42 Or. 528; 71 Pac. 971, the decision being by Justice Bean, who afterwards was an honored Judge of the Federal Court, and who says on page 972:

"We are of the opinion, therefore, that, under such circumstances and for the purposes of this

case, the appointment cannot be regarded as void, and that the value of the petitioner's services and his expenditures, as ascertained and determined by the court appointing him, should be paid by the present receiver from the funds in his possession as if they had been incurred by himself. Where a court has no power or authority to appoint a receiver in any event, or where it has authority, but the appointment is improperly made, and subsequently set aside and vacated on motion of a nonconsenting party, it is probable that, as general rule, the receiver cannot have his compensation or expenses paid from the property, but must look to the parties to the suit. *Lockhart v. Gee*, 3 Tenn. Ch. 332; *French v. Gifford*, 31 Iowa 428; *Pittsfield National Bank v. Bayne*, 140 N. Y. 321; 35 N. E. 630; *Weston v. Watts*, 45 Hun. 219. But where the Court has the general power and authority to appoint a receiver pendente lite in proper cases, and the parties to a pending suit appear and admit that such an appointment is necessary in the suit, and, acting on such assent, a receiver is appointed, his compensation and the expenses necessarily incurred by him in preserving and caring for the property under the order of the Court should be paid out of the fund, although it may be found on further investigation and subsequent examination that the Court was in fact without jurisdiction of the subject-matter, and the suit ultimately be decided adversely to the plaintiff (*Ferguson v. Dent* (C. C.) 46 Fed. 88); and especially is this so where, as here, the benefit of the services of the receiver and of the expenses incurred by him has been appropriated and used by a subsequent receiver, and therefore inured to the estate."

The foregoing language is pertinent to the case at bar in that it will be recalled that the effect of the order of May 28th, 1920, which was O.K.'d and

consented to by the attorneys representing all of the parties, including the plaintiff in error, was to the effect that the receiver should hold this valuable property pending the determination of the plaintiff in error as to whether it would enter its voluntary appearance by June 10th or over a month thereafter and on or before July 6th, 1920, file its answer, complaint in intervention, or other pleading herein setting up its claim of title to the automobile tires and tubes and perforce the State Court under this order, which was assented to and requested by plaintiff in error, was compelled to and did hold the property until the filing of the complaint in the Federal Court. One of the items in the account of the receiver being for rent of premises for storage.

Plaintiff in error does not stand before this Court in an enviable or equitable light.

Plaintiff in error participated as we have repeatedly shown in the litigation and proceedings before the State Court and upon two occasions asked and received the grace and protecting arm of the Court, had its property held and preserved during pending litigation asked and received indemnifying bond and now it turns and bites the arm that protected it and asked by its complaint five thousand dollars damages against the receiver the arm of the Court and in its brief this Court is asked to reverse this case and in this Court's judgment order the District Court to award a judgment of \$690.40 against the receiver, which is in law a judgment against the State Court, a Court of co-ordinate jurisdiction which Court had at all times acted in con-

formity with the requests of plaintiff in error, protected its property and awarded it upon its motion a bond of indemnity.

Perhaps it is charitable to excuse the inequitable and ungrateful position assumed by plaintiff in error as another example of a "soulless corporation".

Dated, San Francisco,

February 21, 1922.

Respectfully submitted,

EDGAR D. PEIXOTTO,

Attorney for Defendant in Error,

John M. Sullivan, as Receiver.

BRIEF FOR INTERVENOR, E. E. GERLINGER.

E. E. Gerlinger, intervenor herein and plaintiff in the action in the State Court, hereby joins in the foregoing brief and position of the receiver herein.

Intervenor's interest herein lies in the fact that he is now contingently liable on a contract of indemnity furnished the bonding company upon the execution of the bond of five thousand (\$5000.00) dollars filed in the State Court to indemnify the Sterling Tire Corporation from loss incurred by reason of the receiver's possession of its property.

There is absolutely no question that the Sterling Tire Corporation submitted itself and its property to the jurisdiction of the State Court by its activities in the State Court proceedings. This submission, which was purely voluntary, subjected the property over which that jurisdiction was exercised to a lien for receiver's fees and expenses under well settled and almost elementary rules.

The property which comes into the hands of a receiver is a fund which is subject to a lien for the receiver's costs and expenses. The State Court, accordingly, subjected the property herein sought to be recovered to a lien in the sum of twenty-six hundred seventy-six and 67/100 (\$2676.67) dollars and costs, etc., as by the judgment of the District Court.

Under rules of comity, which have always been recognized by this Court, the decision and judgment

of the State Court will not be disturbed nor interfered with, jurisdiction having once been properly acquired.

The inconsistency and falsity of the plaintiff in error's position herein is demonstrated by the fact that there is now in full force and effect a surety bond, constituting a valid and binding obligation of the company executing same which indemnifies and saves harmless the Sterling Tire Corporation against the very charge it herein seeks to avoid.

It is respectfully submitted that the decision of the District Court should be affirmed.

Dated, San Francisco,

February 21, 1922.

ROY A. BRONSON,

Attorney for Intervenor,

E. E. Gerlinger.

